Supreme Court, U.S.
FILED

02 161 JUL 29 2002

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No. _____

In the Supreme Court of the United States

WANDA VELEZ-RUIZ,

Petitioner,

v.

GAIL ANNE TRIMBLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN F. ROYAL
Counsel of Record

615 GRISWOLD
SUITE 1724 FORD BUILDING
DETROIT, MI 48226
(313) 962-3738

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

I. Whether the evidence was sufficient to support Petitioner's convictions of health care and medicaid fraud where the undisputed evidence showed that the Petitioner did not participate in the billing process generally, did not select the procedure codes used in the billings, and there was no evidence that Petitioner intended to submit false claims, or knew that claims were being submitted.

II. Whether the Michigan Health Care and Medicaid False Claims Acts are void for vagueness because they fail to provide fair notice of the prohibited conduct, and are so indefinite that they confer unlimited discretion on the jury to determine whether the offenses have been committed.

III. Whether the Michigan Health Care and Medicaid False Claims Acts are unconstitutional because neither contain an element of Mens Rea, and both permit felony convictions based upon mere negligence.

IV. Whether Petitioner's convictions should be reversed where the jury instructions were permised upon statutory language indicating that it is sufficient for conviction if the defendant "should be aware" that the filed health care and medicaid claims were false, in order to fulfill the statutory element of "knowing" or "knowingly", and the jury was thereby allowed to convict based upon a finding of mere negligence, rather than upon a finding that the Petitioner had the specific intent to commit fraud.

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Petitioner Dr. Wanda Velez-Ruiz ("Petitioner" or "Dr. Velez-Ruiz") respectfully prays that a writ of certiorari issue to review the September 25, 2001 decision of the United States District Court for the Eastern District of Michigan in *Velez-Ruiz v. Trimble*, E. D. Mich. No. 98-CV-075582-DT (September 25, 2001). (Apps. C and D). The district court, after denying Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254, also issued an order declining to issue a certificate of appealability. (App. B).

Petitioner filed a notice of appeal with the United States Court of Appeals for Sixth Circuit from the district court's decision, which the Court properly considered as an application for a certificate of appealability under Fed. R. App. P. 22 (b). In an Order filed April 30, 2002, the Court denied Petitioner's application for a certificate of appealability. *Velez Ruiz v. Trimble*, No. 01-2446 (April 30, 2002). (App. A).

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit denying Dr. Velez-Ruiz's request for a certificate of appealability is reprinted in the Appendix to this Petition ("App.") at App. A. The opinion and judgment order of the United States District Court for the Eastern District of Michigan, *Velez-Ruiz v. Trimble*, E. D. Mich. No. 98-CV-75582-DT (September 25, 2001) denying Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254 are set forth at Apps. C and D. The district court's order denying a certificate of appealability is set forth at App. B. The Michigan Supreme Court's denial of Petitioner's application for leave to appeal, *People v. Velez-Ruiz*, Mich. S. Ct. No. 110757 (March 31, 1998) is attached as App. E. The Michigan Court of Appeals' opinion denying relief to Petitioner on direct appeal in *People v. Velez-Ruiz*, 224 Mich. App. 43 (Ct. App. 1997) is set forth at App. G.

STATEMENT OF JURISDICTION

Dr. Velez-Ruiz seeks review of the opinion and order issued by the United States District Court for the Eastern District of Michigan on September 25, 2001 denying her application for habeas corpus relief under 28 U.S.C. § 2254, and denying a certificate of appealability. (Apps. B, C, and D). The Notice of Appeal from that judgment that Petitioner filed in the United States Court of Appeals for the Sixth Circuit was properly treated as an application for a certificate of appealability. The Court of Appeals declined to issue a certificate of appealability in an order entered on April 30, 2002. (App. A).

In her request for habeas corpus relief, Petitioner challenged the Michigan Court of Appeals' opinion in *People v. Perez-DeLeon*, 224 Mich. App. 43 (1997) that was issued on June 3, 1997, affirming her convictions and sentences for multiple counts of filing false Medicaid and other health care claims. (App. G). In her appeal to the Michigan Court of Appeals, Petitioner challenged the Judgment of Conviction entered in the Ingham County, Michigan, Circuit Court, the Honorable Peter D. Houk, Chief Judge, presiding, case number 92-64428-FH. The Judgment of Conviction and Sentence was entered January 5, 1994.

This Court has jurisdiction pursuant to 28 U.S.C § 1331.

STATEMENT OF THE CASE

Petitioner, an internist who practices in a low income Hispanic community within Detroit, Michigan, was tried and convicted for multiple claims of medical insurance fraud in a state of Michigan circuit court. Petitioner was prosecuted for using billing codes for services that were performed, but that were not reimbursable under the codes for office procedures that were used on the claims for payment. She was not

accused of billing for services that were medically unecessary, and that were not performed.

Petitioner only practiced medicine in her office, delegating all responsibility for medical billing to her husband and co-defendant, Edgardo Perez-DeLeon ("Perez-DeLeon"), and to "Diversitech", a medical billing company. She was not involved in the submission of bills to insurers, and she denied knowingly submitting any false claims for payment.

Petitioner maintains that she should not be liable for criminal insurance fraud under the circumstances since she never had specific intent to take money from any insurer based upon false information she provided in a claim.

Two issues underlie each of the claims presented for review. The first concerns the amount of notice a medical practitioner must be given before criminal liability can attach for the practitioner's failure to adhere to complex billing requirements set forth in billing manuals prepared by the insurer. The notice that physicians such as Dr. Velez-Ruiz were required to heed was contained in billing manuals that expert witnesses for the prosecution admitted were confusing, unclear and subject to differing interpretations. Petitioner asserted in all the lower courts that the billing manuals do not supply sufficient notice so that practitioners can know when their billing practices will become criminal, and that therefore notice of what conduct is prohibited before criminal liability attaches is constitutionally inadequate.

A second, related issue that underlies Petitioner's claims submitted for review asks whether proof of specific intent is required for a criminal medical insurance fraud conviction to stand. Petitioner submits that the prosecution should have been required to show specific intent to defraud before she was determined to be liable for criminal insurance fraud. However, she was convicted under statutes that the trial court construed as allowing a criminal conviction upon a

showing of knowledge or constructive knowledge. This level of knowledge is inadequate to pass constitutional muster, and impermissibly allows criminal liability to attach based on a showing of a level of intent for which only civil liability may be imposed.

A. Procedural History

Petitioner and Perez-DeLeon were jointly jury-tried and Petitioner was convicted of 13 counts of Medicaid and Health care fraud, of a 32 count felony information. (App. I). On January 5, 1994, Dr. Velez-Ruiz was sentenced to 5 years probation with conditions that she perform 500 hours of community service. She was also ordered to pay restitution in the amount of $11,343.63, costs of $500.00, fines of $25,000.00, a victims' rights fee of $30.00, and prosecution costs of $1,497.00.

Petitioner appealed her convictions and sentences to the Michigan Court of Appeals. On June 3, 1997, the Court of Appeals affirmed her convictions in all respects (App. G). Her motion for rehearing was denied by way of Order entered August 26, 1997 (App F).

Dr. Velez-Ruiz filed a Delayed Application for Leave to Appeal in the Michigan Supreme Court. The Michigan Supreme Court denied leave to appeal in an Order entered March 31, 1998 (App. E).

On December 29, 1998 Dr. Velez-Ruiz filed an application for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, raising 5 claims. The application was denied in the district court's opinion order and judgment issued on September 25, 2001. (App. C and D).

Dr. Velez-Ruiz's application set forth five (5) separate grounds on which she claimed that her convictions were

obtained in violation of the United States Constitution and federal laws. She alleged in her application that the decisions of the Michigan courts affirming her convictions were either based on unreasonable applications of clearly established federal law, or they were contrary to clearly established federal law as determined by the United States Supreme Court and other federal courts. 28 U.S.C. § 2254 (d) (1), (2).

B. Factual Background

Dr. Velez-Ruiz and co-defendants Edgardo Perez-DeLeon ("Perez-DeLeon") and Dr. Roberto Benejam ("Dr. Benejam") were each charged with multiple counts of conspiracy and Medicaid and health care fraud (App. I). After Dr. Benejam pled guilty, the prosecution continued against Perez-DeLeon and Dr. Velez-Ruiz as co-defendants.

All of the charges arose out of the operation of Dr. Velez-Ruiz's medical practice in Detroit, Michigan in an economically deprived, predominantly Hispanic community. Dr. Velez-Ruiz, the only Spanish speaking female internist in the area, shared her practice with Dr. Benejam. Perez-DeLeon, Dr. Velez-Ruiz's husband, managed the billing for the practices. Both doctors participated in the Medicaid and Blue Cross/Blue Shield (BC/BS) insurance programs. Dr. Velez-Ruiz alone participated in the Medicare Part B program.

Perez-DeLeon and Dr. Velez-Ruiz were jointly tried[1] in Ingham County Circuit Court. After the prosecution rested, defense counsel moved for a directed verdict. The trial court dismissed the conspiracy charges against both defendants and dismissed the double-billing allegations against Petitioner. At

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[1] The defense filed a pretrial motion to sever the trials, but it was denied on August 31, 1993.

the end of a twelve-day trial on December 6, 1993, Dr. Velez-Ruiz was convicted of 13 counts of Medicaid and health care fraud, specifically, Counts 11-14, 21-24 and 28-32[2] of the information. Her husband was convicted of 21 counts of Medicaid and health care fraud, specifically Counts 11-19 and 21-32.

At sentencing, the trial court found that Petitioner's involvement in the fraud offenses for which she was convicted was minimal compared to her husband. The trial court made a specific recommendation that her license to practice medicine not be revoked.

Prior to trial, on July 30, 1993, Dr. Velez-Ruiz brought a motion to declare the Medicaid False Claim Act, M.C.L. 400.601, M.S.A. 16.614(1), and Health Care False Claim Act, M.C.L. 752.1001, M.S.A. 28.547(101), unconstitutional, arguing that: (1) the Acts failed to require intent to defraud and (2) the Acts were void for vagueness. On August 31, 1993, the trial court ruled that M.C.L. 400.601 and M.C.L. 752.1001 were constitutional based on *United States of America v Bay State Ambulance and Hospital Rental Service, Inc*, 874 F. 2d 20 (1st Cir. 1989)(App. J).

The prosecution's theory at trial was that the defendants' billing practices were proscribed by the health care provider manuals, the Medicaid Assistance Program Provider Manual (MAPPM), Medicare Physician's Manual (MPM), and Michigan Uniform Procedure Coding Manual (MUPCM). The prosecution charged that Petitioner's billings for referral appointments, making prescriptions, and

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[2] Violations of M.C.L. 400.607 (1), M.S.A. 16.614(7); M.C.L. 752. 1003(1), M.S.A. 28.547 (103), respectively.

reviewing home health care forms or patient letters from other physicians under office service procedure codes 90040-90070, were fraudulent. The prosecutor claimed that these codes required that the patient be physically examined by the doctor before the doctor could bill under an office service procedure code. There were no allegations that services billed by Petitioner were medically unnecessary or were not performed.

The government theorized that Dr. Velez-Ruiz was liable based on the terms of her enrolment in the insurance programs. By contract, she had agreed to insure the accuracy of claims submitted by her office. Liability for her husband Perez-DeLeon was based on evidence indicating that he was responsible for billing and that he knew the billing practices he employed were improper.

The defense countered at trial that the health care provider manuals did not clearly proscribe the billing practices employed, and that Dr. Velez-Ruiz reasonably believed that a physical examination was not a prerequisite to billing for a service rendered under an office examination procedure code. Because the manuals do not clearly define what could be billed under an office procedure code, Dr. Velez Ruiz neither knew nor should have known that her husband's billing practices were proscribed.

REASONS FOR GRANTING THE WRIT

I. A DIRECTED VERDICT OF ACQUITTAL SHOULD HAVE BEEN GRANTED AS TO ALL THE HEALTH CARE FRAUD CHARGES AGAINST PETITIONER BECAUSE THE UNDISPUTED EVIDENCE SHOWED THAT PETITIONER DID NOT SELECT THE PROCEDURE CODES, DID NOT PARTICIPATE IN THE BILLING PROCESS GENERALLY, AND THERE WAS NO EVIDENCE THAT THE SHE INTENDED TO SUBMIT FALSE CLAIMS OR KNEW THAT FALSE CLAIMS WERE BEING SUBMITTED

Petitioner sought relief in the federal district court under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. The District Court ruled that Petitioner did not meet § 2254(d)'s requirements and denied the petition.

The Antiterrorism and Effective Death Penalty Act of 1996 modified federal habeas court's role in reviewing state prisoner applications. *Williams v. Taylor,* 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). 28 U.S.C. § 2254(d)(1) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

This Court stated in *Williams* that § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Court has done on a set of materially indistinguishable facts. *Id.*, at 405-406, 120 S.Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable.

The federal district court analyzed all of Petitioner's claims for habeas corpus relief with the foregoing standard in mind. Petitioner maintains here that under this standard the district court should have granted her application for habeas corpus relief.

The prosecution's theory at trial was that Dr. Velez-Ruiz and Perez-DeLeon, her office manager and husband, improperly used reimbursable office procedure codes to bill for medical procedures that were not reimbursable. The prosecution never took the position that Dr. Velez-Ruiz' patient records and charts contained inaccuracies or deficiencies. As to allegations that a patient was referred by Dr. Velez-Ruiz to another medical professional, had a

prescription renewed, or had a medical form reviewed, filled out and signed, but had not received a physical examination, it was undisputed that her medical records accurately reflected exactly what services were performed. The prosecution's precise claim was that complex procedural codes were used improperly to designate unreimbursable procedures as reimbursable.

At the conclusion of the prosecution's case, Dr. Velez-Ruiz moved for a directed verdict of acquittal. The trial court granted the motion in part, and dismissed the conspiracy counts as to both Defendants, and the double-billing allegations against Dr. Velez Ruiz. Only the counts concerning submission of vouchers with improper procedure codes were submitted to the jury.

The standard for deciding challenges to the sufficiency of the evidence was set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see also* U.S. Const., Amends. V, VI, and XIV. Here, the trial court erroneously determined that sufficient evidence had been presented with respect to the each of the essential elements of the false billing counts as to Dr. Velez-Ruiz so that a directed verdict of acquittal was denied.

The Michigan Court of Appeals affirmed this finding (App. G), and the federal district court found that the Court of Appeals' decision that sufficient evidence was presented as to the elements of health care fraud "was a reasonable application of controlling federal law". (App. C).

Importantly, Dr. Velez-Ruiz maintained from the outset that the crimes of Medicaid and health care fraud are both crimes of specific intent. Her position in this regard has been critical to understanding her position on nearly all of her

claims. The trial court failed to find that specific intent was required for these offenses. The Michigan Court of Appeals failed to address this question, finding that the jury had been properly instructed on the requisite intent issues, regardless of whether the crimes are of specific or general intent. (App. G). The federal district court made only short references to the fraud statutes to define the level of intent required, but did not find that specific intent was required. (App. C.)

The trial court's definition of the appropriate level of intent, taken from the language in the offense statutes, (App. J), was reflected in the following portion of the jury instruction:

> "[T]he Defendant must have acted knowing that the claim was false. "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid or health care benefit. "Knowing" or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present."

The trial court erroneously determined that sufficient evidence had been presented with respect to the essential elements of the false billing counts as to Dr. Velez-Ruiz. The evidence was not sufficient for a reasonable jury to conclude that Dr. Velez-Ruiz was aware of, or was knowingly involved in, any fraudulent billing.

According to *Jackson*, supra, the trial judge must consider the evidence presented by the prosecution up to the time the motion for a directed verdict is made. Here the evidence consisted of proof of the billings themselves, testimony of office employees, various investigators, and the testimony of cooperating co-defendant Dr. Benejam. Dr. Benejam, along with witnesses Sandra Reyes and Santa Delvalle, indicated that he was no more involved in the office billing process than was Dr. Velez-Ruiz. Dr. Benejam denied any intent to file false claims or to obtain any financial benefit that he was not entitled to, and he denied any criminal intent whatsoever.

While the Michigan Court of Appeals denied relief on this issue, that Court's opinion was premised on a misunderstanding of the evidence offered during the trial. The opinion states: "These convictions arose from defendants improperly billing Medicaid, Medicare, and Blue Cross Blue Shield of Michigan (BCBSM) for office visits when patients were not in the office." This synopsis of the trial is inaccurate and misleading. The essence of the prosecution's case is that Dr. Velez-Ruiz billed Medicaid and BCBSM for services which were concededly performed, but which several experts testified fell outside the complex definitions of office service procedure codes which the health care agencies use for reimbursement of health care providers. Whether or not patients were actually physically present in the office when the services were performed was not a significant focus during the trial. The witnesses for the prosecution admitted that it was impossible to tell from a review of the patient charts whether or not the patients were present when the services were performed.

For example, former employee Santa Delvalle reviewed the chart of patient Genara Davila. She said that

there had been no physical examinations of this patient on the five dates of service. She made this determination because the chart did not have notations of the vital signs of the patient for any of those five days. On these dates of service, Dr. Velez-Ruiz had referred Davila to an agency for arrangements for a visiting nurse to see her at home, she had filled out medical forms to arrange for the home health care, and she had notified a pharmacy that the patient needed a prescription. Delvalle could not tell from the chart whether or not the patient was in the office when the referral was made, when the medical forms were filled out, or when the prescriptions were transmitted to the pharmacist. Nor could she tell whether or not Dr. Velez-Ruiz consulted with the patient, or with another doctor, before performing the services, or how long it took to perform the services.

The prosecution argued that these services, which were in fact performed, were not reimbursable under the office service codes used on the invoices, whether the patient was physically present in the office or not. The prosecution contended that a physical examination of the patient was necessary in order to bill under the office service codes used. The prosecution took this position even though the three experts who testified concerning the meaning of the procedure codes disagreed among themselves as to the interpretation of the codes, and all agreed that there were circumstances when these codes could properly be used even though there had been no physical examination of the patient. For example James Groen, who oversaw production of Medicaid policy, admitted that three of the examples provided in the MUPCM of a brief level of service (Code 90040) do not specify that a patient exam is necessary, and one of them, (review of X-ray and abbreviated discussion with patient) could certainly be performed without a physical examination. Further, Groen conceded that "adjustment of therapeutic management", which

is properly billable as a limited level of office service (Code 90050) did not necessarily require a patient exam. Groen further conceded that numerous examples of billable procedures did not specify that a physical exam was required, and that this is confusing.

Patrice Helwig, from BCBSM (Blue Cross/Blue Shield of Michigan), testified that someone who referred only to the MUPCM could easily conclude that there are office services which can be properly billed without a patient exam. Helwig contended, however, that the MUPCM must be read in conjunction with the MPM, which indicates that all billable services require a physical exam except for two: radiology and pathology. Dr. Seymour Adelson, of BCBSM, contended that the physical examination requirement for billing for office services is established by "negative implication" rather than by any express language to this effect. Adelson eventually admitted that examples C and E under the limited level of service, and B, D, and F under the intermediate level of service (90060) do not require a physical exam of the patient.

The prosecution contended that the services provided were not reimbursable pursuant to the office service codes utilized by Dr. Velez-Ruiz's office manager, unless a physical examination of the patient also took place. Dr. Velez-Ruiz contends that this is not the only reasonable interpretation of the office service codes, and, even if it is, the prosecution was unable to prove that the erroneous billings were not the result of honest misinterpretations of complex and confusing regulations. To state that this trial only involved allegations of "billing. . . for office visits when patients were not in the office," suggests that the defense position is fundamentally illogical and that evidence of guilt was overwhelming. In fact, this was a closely contested trial, and both defendants were in fact acquitted of all counts which would have required the jury

to find intentional fraud based upon the jury instructions as given.

In discussing this claim, the Michigan Court of Appeals improperly found that because Dr. Velez-Ruiz submitted her billings to the various insurance carriers via a computerized billing service and so notified the carriers, the statutes created a rebuttable presumption that any false claim was knowingly made. MCLA 400.608 (3); MSA 16.614 (8)(3); MCLA 752.1007(3); MSA 28.547(107)(3). (Statutes set forth at App. H).

The statutes create a rebuttable presumption that claims made electronically were knowingly made, not a rebuttable presumption that claims were made knowing them to be false. The defense only asserted that the prosecution did not present sufficient evidence to establish that Dr. Velez-Ruiz submitted these claims knowing them to be false.

The federal district court, considering whether there was evidence that Petitioner knowingly submitted false claims, looked to the statutory definition of "knowingly", then pointed to evidence that Petitioner signed provider forms that obligated her to familiarize herself with and take responsibility for billing procedures. The Court further referred to testimony by Agent James Clickner that Petitioner "was aware that office visit billings or claims had been made for peripheral or ancillary services". Dr. Benejam testified that Petitioner was within listening distance when Perez-DeLeon said the office would be billing for reviewing consultation letters. (App. C).

The Michigan Court of Appeals and the federal district court also pointed to the evidence of the 1,357 "similar acts". Under the circumstances, it is just as likely that the number of repetitions of the alleged improper billing methods indicated

a good faith misunderstanding, as that it indicates that false claims were submitted with knowledge of their falsity. This evidence is insufficient to justify submission of this case to the jury.

The only other evidence proffered by the prosecution that even touched on Petitioner's knowledge or specific intent is the simple fact that she was married to her husband and co-defendant. The inferences which the jury must necessarily have drawn ironically arose primarily from Petitioner's *lack* of knowledge of the billing procedures. Her husband's knowledge, intent, and statements were prejudicially transposed onto Dr. Velez-Ruiz by way of the joint trial. However, the fact that Petitioner's co-defendant is her husband is not sufficient evidence to permit a rational jury to find criminal knowledge on her part.

Dr. Velez-Ruiz practiced medicine. Her connection to the billing activity consisted of her suggestion of diagnostic codes. Although, as provider, she did bear ultimate civil responsibility for any errors which occurred, Perez-DeLeon had final responsibility and control over the office's billing practices. The prosecution made no showing that Dr. Velez-Ruiz intentionally made an untrue or partially untrue statement on a claim to a health care insurer. Considering the evidence at the time of the defense motion, no rational jury could have found that Dr. Velez-Ruiz possessed the criminal knowledge required for a conviction. Therefore, Dr. Wanda Velez-Ruiz's convictions should be vacated for insufficient evidence.

II. THE MICHIGAN HEALTH CARE AND MEDICAID FALSE CLAIMS ACTS ARE VOID FOR VAGUENESS BECAUSE THEY FAIL TO PROVIDE FAIR NOTICE OF THE PROHIBITED CONDUCT, AND ARE SO INDEFINITE THAT THEY CONFER UNLIMITED DISCRETION ON THE JURY TO DETERMINE WHETHER THE OFFENSES HAVE BEEN COMMITTED

Prior to trial, defense counsel for Dr. Velez-Ruiz moved to declare the Medicaid False Claims Act, MCL 400.601, *et. seq.* and the Health Care False Claims Act, MCL 752.1001, *et. seq.*, unconstitutional. Defense counsel argued that the "should be aware" requirement in the definition of "knowing" and "knowingly" in both Acts was unconstitutionally vague, and the Act failed to give Petitioner adequate notice of the conduct proscribed. The trial court denied the motions, stating only that it was following the reasoning in *United States of America v. Bay State Ambulance and Hospital Rental Service, Inc.*, 874 F.2d 20 (1st Cir. 1989)(Appx. J), and the Michigan Court of Appeals affirmed. The federal district court found that the Michigan Court's ruling was a reasonable application of controlling law because the statutes clearly apply to Petitioner, so she "cannot successfully challenge the statute for vagueness". To the contrary, both the Medicaid and Health Care False Claim Acts are unconstitutionally vague in that the Acts are so indefinite that unstructured and unlimited discretion was conferred upon the jury. U.S. Const. Amends. V, XIV.

It is a fundamental tenet of due process that "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." *United States v. Batchelder*, 442 U.S. 114, 123; 99 S.Ct. 2198; 60 L.Ed.2d 755 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451, 453; 59

S.Ct. 618; 83 L.Ed. 888 (1939). As stated in *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447 (1965):

"A law fails to meet the requirement of the Due process Clause if it is so vague and standardless that it leaves. . . judges and jurors free to decide without any legally fixed standards, what is prohibited and what is not in each particular case".

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness. The statute must be defined in a manner that does not leave interpretation of its terms to the trier of fact. Where the legislature fails to provide minimal guidelines and standards for juries to follow, but rather allows them to define what is prohibited, then it is unconstitutional. *Kolender v. Lawson*, 461 U.S. 352, 358; 103 S.Ct. 1855; 75 L.Ed.2d 903 (1983).

The testimony established that the requirements for billing under the Medicare, Medicaid, and Blue Cross programs are spelled out in various provider manuals. The prosecutor's experts admitted that there were disagreements as to the interpretation of the language in the manuals. The prosecutor's primary expert on Medicaid policy, James Groen, admitted that the provider manuals did not clearly define "examination". Dr. Velez-Ruiz was convicted for billing for office services in situations where no physical examination of the patient took place.

Neither Groen nor any of the other experts called by the prosecutor testified about Section 2020A of the Medicare Provider Manual, which states that a service is a physician's service where the doctor physically "examines the patient in

person or is able to visualize some aspect of the patient's condition without interposition of a third person's judgment." To the contrary, the experts testified that a payable physician service required a physical examination by the doctor. One of the witnesses, Patricia Helwig, admitted that there were exceptions but that these only included radiology services and pathology.

Whatever the actual rule, it is apparent from the above that the requirement is at best, vague and confusing. Indeed, one interpretation is that all of the billings at issue were legal so long as Dr. Velez-Ruiz was able to visualize her patients' conditions at the time she rendered the allegedly non-payable service.

The jury was permitted to determine the meaning of "facts" as used in both Acts' definitions of "knowing." In order to violate either Act a person must make or present or cause to be made or presented a claim knowing that the claim is false. M.C.L. 400.607(1); M.C.L. 752.1003 (App. H). A person can knowingly do so where he "is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid [or health care] benefit."M.C.L. 400 602(f); M.C.L. 752.1002(h). Thus, for a jury to find a violation of the Acts, it must in part find that the person possessed "facts" which made or should have made him aware of the nature of his conduct.

The jury's question then becomes, what are the facts that the person is or should be aware of? Are the "facts" the information provided in the health care provider manuals, the common practice of doctors locally, statewide or nationwide, or the facts of the individual case? The evidence introduced by

the prosecution in the case at bar combined all of these possibilities. Moreover, this Court has indicated that interpretations from the agency experts, like interpretations in policy manuals, and enforcement guidelines, lack the force of law. Cf. *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621(2000).

As evidenced by the instant case, the "facts" can be whatever the prosecutor chooses to present in his case-in-chief. Prosecutors and juries cannot be allowed to pursue their personal predilections in determining whether a vague statutory standard has been violated. *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

The Michigan Court of Appeals dismissed this argument based upon a citation to *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987). However, *Larm* is not on point. The *Larm* case involves an interpretation of a federal statute prohibiting Medicaid fraud. At that time the statute was designated 42 U.S.C. § 1396h(a)(1). The statute is now found at 42 U.S.C. § 1320a-7b. This statute does not contain the "should be aware" language or any statutory definition of "knowing", as do the statutes at issue here. In fact, as pointed out in *Larm*, *supra*, at 783, "an element of the crime is the specific intent to make a false statement." [citation omitted]. *Id.* at 783.

The definition of "knowing" as provided by the Acts is unconstitutionally vague. The definition grants a jury unstructured and unlimited discretion to arbitrarily determine what "facts" trigger a defendant's duty of awareness. Accordingly, Dr. Velez-Ruiz's convictions must be vacated.

III. THE MEDICAID AND HEALTH CARE MICHIGAN FALSE CLAIMS ACTS ARE UNCONSTITUTIONAL BECAUSE NEITHER CONTAIN AN ELEMENT OF MENS REA.

This Court has made it clear that statutes prohibiting fraud cannot be made into strict liability offenses. *Morissette v. United Sates*, 342 US 246, 72 S. Ct. 240 96 LEd2d 288 (1952); *Posters 'N' Things v. United States*, 511 US 513; 114 S Ct 1747, 128 L Ed 2d 539, 550-551 (1994); U.S. Const. Amends. V, VI, and XIV. Absent a specific intent element, the Medicaid and Health Care False Claims Acts are unconstitutional. As to this claim, the district court found that the statutes and jury instructions do have a clear mental element, a knowledge element, that involves proof of more than mere negligence. (App. C.).

To the contrary, these Acts, by their express language, do not require an element of *mens rea* and, therefore, contravene the mandate of this Court in *Morissette v. United States*, supra, in which this Court held that a statute cannot be interpreted as dispensing with mens rea where that statute is a criminal codification of a common law offense absent express legislative direction.

In *Morissette*, this Court explained that some statutory crimes, public welfare offenses, may permissibly omit a *mens rea* requirement, i.e., the civil concept of strict liability can be extended to certain criminal statutes. *Id.* at 255-256. Such public welfare offenses ". . .do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." *Id.* at 255. Furthermore, the penalties associated with such offenses, ". . .commonly are relatively small, and conviction does no grave damage to an offender's reputation."

Id. at 256. The Court refused, however, to extend strict liability to statutes that codified common law offenses. Thus, the larceny statute at issue in *Morissette*, required an element of *mens rea*.

The Medicaid False Claim Act and the Health Care False Claim Act, codify the common law offense of fraud. These Acts, unlike the public welfare offenses described in *Morissette*, create felony offenses with stringent penalties ranging from four to ten years imprisonment and punitive fines up to $50,000.00. Consequently, pursuant to *Morissette*, the Acts cannot dispense with *mens rea* as a necessary element.

When the Medicaid False Claim Act was originally enacted in 1977 it required a finding of fraudulent intent to establish guilt. M.C.L. 400.602(b), M.C.L. 400.602(c). The Act's *mens rea* requirement was removed in 1984, when the Health Care False Claim Act, HB 5103, was enacted providing new definitions of "false" and "knowing." The Medicaid False Claim Act was amended by HB 5102 to provide identical definitions. "False" is now defined as "...wholly or partially untrue or deceptive." M.C.L. 400.602(d), M.C.L. 752.1002(c). "Knowing" is shown where a person is in possession of facts or should be aware that the nature of his or her conduct and that his or her conduct is substantially certain to cause payment of benefits. M.C.L. 400.602(f); M.C.L. 752.1002(h)(App. H).

The analysis prepared by the House Legislative Analysis Section for HB 5102 and 5103, indicates that a purpose behind both bills was to address difficulties in prosecuting those making false health care claims. The analysis explained that persons had previously avoided prosecution under the original false claim act by arguing the

nature of the claims or by asserting that claims were submitted without their knowledge. Clearly, the legislature succeeded in easing the prosecutor's path to conviction because the current definitions of "false" and "knowing" permit a finding of guilt based on mere negligence.

The definition of "knowing" does require awareness, either actual or imputed, but only as to whether the nature of the actor's conduct is "substantially certain" to cause payment of a Medicaid or health care benefit. The term "false" is defined without regard to the actor's intent. Together, the statutory definitions of "knowing" and "false" effectively allow a presumption of fraudulent intent to arise from the knowing act of filing a claim if the claim is objectively determined to be false, contrary to *Morrisette*. This unlawful presumption is easier to show where fraudulent intent may be proven by a showing that the defendant "should have known". Under these Acts, a defendant can be convicted where he had neither actual intent to defraud nor actual knowledge of the false claim. Instead, a finding of guilt may be predicated on mere negligence.

It is true that the definition of "'knowing' excludes" . . . conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be presented." M.C.L. 400.602(f); M.C.L. 752.1002(h). Still, this exclusion does not cure the fact that the Acts unlawfully permit a finding of guilt to be predicated on mere negligence.

Dr. Velez-Ruiz's convictions were likely premised on this portion of the definition of "knowing". The jury may have accepted her testimony that she believed that Perez-DeLeon's billing practices complied with the manuals' guidelines and, *thus, that she had no intent to defraud*, but the

jury undoubtedly thought it had to find her guilty because the definition of "knowing" includes situations where "the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present."

The Medicaid and Health Care False Claim Acts must be declared unconstitutional if they are determined to lack a specific intent requirement. Absent a requirement of specific intent, the Acts contravene the mandate set forth in *Morissette* by failing to require any culpable *mens rea*. Accordingly, the federal district court should have vacated Petitioner's convictions.

IV. PETITIONER'S CONVICTIONS MUST BE REVERSED WHERE THE JURY INSTRUCTIONS WERE PREMISED UPON STATUTORY LANGUAGE INDICATING THAT IT IS SUFFICIENT IF A DEFENDANT "SHOULD BE AWARE" THAT THE CLAIMS FILED WERE FALSE IN ORDER TO FULFILL THE ELEMENT OF "KNOWING" OR "KNOWINGLY" AND THE JURY WAS THEREBY ALLOWED TO CONVICT BASED ON A FINDING OF NEGLIGENCE AND NOT SPECIFIC INTENT

In order to violate either the Medicaid or Health Care False Claim Acts, a person must present a claim knowing that it is false. MCL 400.607(1); M.C.L. 752.1003(3). "Knowing" is defined as: "possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid [or health care] benefits". It does not include "conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present". M.C.L. 400.602(f); M.C.L. 752.1002(h)(App. H).

"False" is defined as ". . . wholly or partially untrue or deceptive." M.C.L. 400.602(d), M.S.A. 16.642(2); M.C.L. 752.1002(c); M.S.A. 28.547(102)(App. H).

The language in the definitions of "knowing" and "false" allows fraudulent intent to be presumed if a claim is objectively determined to be inaccurate. A finding of guilt may be predicated upon a determination that defendant "should have known". A defendant can therefore be convicted where he or she had neither actual intent to defraud nor actual knowledge of a false claim. A finding of guilt may be predicated on mere negligence.

Dr. Velez-Ruiz timely requested that the jury be instructed on the issue of specific intent and that the jury be informed that the prosecution must prove that she intended to file false Medicaid and health care claims. The trial court refused to give such an instruction, stating it was unclear whether the charged offenses were crimes of specific or general intent. Therefore, the trial court instructed the jury on the "knowing" element using the statutory definition, which is confusing and imprecise. This definition permitted the jury to convict Dr. Velez-Ruiz based upon a theory of negligence. The Michigan Court of Appeals upheld the trial court's instructions based upon a determination that constructive knowledge was sufficient to establish guilt (App. G). The federal district court ruled that Petitioner could be convicted upon the instructions that lacked a specific intent element because criminal liability may be premised upon a mens rea element similar to "reason to know". (App. C).

To the extent that the jury instructions permitted the jury to convict Dr. Velez-Ruiz without determining that she intended to file false claims or filed claims knowing them to be false, the jury was improperly instructed.

At the close of Dr. Velez-Ruiz's trial, defense counsel requested that the jury be instructed that the prosecution would have to prove specific intent. The proposed instruction stated in part that the crimes charged require proof of a specific intent, so that the prosecution must prove not only that the defendant did certain acts, but that she did the acts with the intent to cause a particular result, and that the prosecution must prove that the defendant intended to file false Medicaid and health care claims.

The trial court denied this request and did not mention intent during the instructions. Upon release of the jury, defense counsel objected again, and the court found that Medicaid and health care fraud may or may not be specific intent crimes, but that, to the extent they require evidence of intent, the jury instructions given by the court properly defined the intent requirement.

The trial court instructed the jury that in order to be found guilty of Medicaid and health care fraud, the Defendant "must have acted knowing that the claim was false." The trial court further instructed the jury that, "'knowing' or 'knowingly' does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." The trial court's instruction here erroneously sets forth a standard of mere negligence.

The issue of whether Medicaid and health care fraud are specific intent crimes in Michigan has been subject to varying interpretations. *People v. American Medical Centers*, 118 Mich. App. 135, 153, 423 N.W.2d 782 (1982), held the predecessor statute to the current statute prohibiting Medicaid fraud established a crime which required proof of a specific intent. *Id.*, at 153; M.C.L.A. 400.607; M.S.A. 16.164(7).

The statutory definition of "knowing" and "knowingly" enacted when the statutes were revised subsequent to *American Medical Centers, supra*, was interpreted as a specific intent crime in *People v. Premen*, 210 Mich. App. 211, 532 NW2d 872 (1995), *reh. denied*, 7/21/95, *precedential effect nullified.*, 450 Mich. 949 (1995). *Premen* stated that health care fraud is a specific intent crime because of the requirement that it be done "knowingly." As the *Premen* court stated, "[w]here a statute requires that the criminal act be committed 'knowingly,' the crime is a specific intent crime." *Id.*, citing *American Medical Centers, supra*, at 153. Under *Premen*, Medicaid fraud, which also requires that the act be done "knowingly", must also be a specific intent crime.

The Court of Appeals panel that decided the *Premen* case clarified its position in the Order issued July 21, 1995, denying rehearing in that matter(App. K). The Court order stated that 1984 P.A. 333, Sec. 1,

> did not alter those portions of the definition of "knowledge" which provided the analytical framework for the holding in *People v. American Medical Centers of Michigan, Ltd*, 118 Mich. App. 135 (Ct. App. 1982), that the crime in question is one containing an element of specific intent. Medicaid or health care billing fraud is not one of the situations in which knowledge and intent are distinguishable. Cf. *Posters 'N' Things v. United States*, 511 US 513; 114 S Ct 1747, 128 L Ed 2d 539, 550-551 (1994)(App. K).

Application of the analysis of the *Premen* opinion to the facts of this case also supports the conclusion that the jury was not properly instructed on the issues of "knowing" or "intent." Although the Michigan Supreme Court nullified the precedential effect of the *Premen* decision, this action only gave *Premen* the status of an unpublished opinion.

In concluding that the Michigan Medicaid and health care fraud statutes are specific intent crimes *Premen* adhered to *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), wherein this Court held that, absent a clear statement of legislative intent, a statute cannot be interpreted as dispensing with *mens rea* where it codifies a common law offense. *Premen* advanced the principles reaffirmed in *Posters 'N' Things, supra*; *Staples v. United States*, 511 U.S. 600 , 114 S.Ct 1793, 128 LEd2d 608 (1994), and *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1990), in which this Court required proof of specific intent for felony convictions like the ones in the case at bar.

The foregoing authorities establish the principle that specific intent must be proven for felony convictions like the one in the case at bar. *Premen's* interpretation that health care fraud is a specific intent offense advanced this Court's requirement that felonies or statutory codifications of common law crimes must contain a *mens rea* element.

The trial court's holding that Medicaid and health care fraud are not specific intent offenses is contrary to *Posters N' Things, supra*; *Staples*, *supra*, and *Cheeks*, *supra*. U.S. Const. Amend., VI, and XIV. Accordingly, the court's refusal to give the requested specific intent instruction amounted to reversible error, because the instruction given failed to adequately apprise the jury of the requisite intent.

Petitioner has a constitutional right to a properly instructed jury. *Francis v. Franklin*, 471 US 307, 105 S.Ct. 1065, 85 L Ed 2d 344 (1985);*Sandstron v. Montana*, 442 US 510, 99 S.Ct. 2450, 61 L Ed 2d 39 (1979). U.S. Const. Amends. V, VI, and XIV.

Unlike *American Medical Centers*, *supra*, and other Michigan cases in which the statutes revealed the state of mind required for the crime, the statutes involved in the case at bar fail to delineate the state of mind required for a conviction of Medicaid or health care fraud. The trial court's mere reading of the statutes during its jury instructions failed to properly apprise the jury of the fact that health care fraud is a specific intent crime.

This Court should grant review and determine that the jury instructions for the offenses for which Petitioner was convicted did not comport with Supreme Court precedent, and that the jury should have been required to make a finding of specific intent before entering a criminal conviction for insurance claim fraud.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant her request for a petition for a writ of certiorari.

Respectfully submitted,

John F. Royal
615 Griswold
Suite 1724 Ford Building
Detroit, MI 48226

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 30, 2002]

No. 01-2466

WANDA VELEZ-RUIZ,
Petitioner-Appellant,
v.

GAIL ANNE TRIMBLE,
Respondents-Appellees

Before MARTIN, Chief Circuit Judge.

ORDER

Wanda Velez-Ruiz appeals a district court order dismissing her petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The receipt of the notice of appeal has been construed as an application for a certificate of appealability under Fed. R. App. P. 22(b). Upon review, the court denies Velez-Ruiz's application for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Dated November 21, 2001]

No. 98-CV-75582-DT

WANDA VELEZ-RUIZ,
Petitioner,
v.

GAIL ANNE TRIMBLE,
Respondent.

ORDER DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

I. Introduction

On September 25, 2001, the court issued an order denying Petitioner Wanda Veliz-Ruiz's motion for writ of habeas corpus made pursuant to 28 U.S.C. § 2254. Under Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c) (1), an applicant cannot take an appeal of such an order without the issuance of a certificate of appealability.

In the instant case, Petitioner, through counsel, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that she had been convicted and sentenced in violation of her constitutional rights. Specifically, she presented the following five claims:

> I. Petitioner's convictions are supported by insufficient evidence.
>
> II. Petitioner should have been granted a separate trial, because evidence of her co-defendant's guilt was unfairly prejudicial.
>
> III. Petitioner was denied a fair trial by the trial court's refusal to instruct the jury on specific intent and by the jury instructions given concerning the mental elements of the crimes charged.
>
> IV. If Petitioner's conviction offenses are not specific intent crimes, the convictions are unconstitutional because the offenses do not contain a *mens rea* element.
>
> V. The statutes under which Petitioner was convicted are unconstitutionally vague, because they fail to give adequate notice of the conduct proscribed.

The court denied Petitioner's motion for writ of habeas corpus and, for the following reasons, will decline to issue a certificate of appealability.

II. Standard

"If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Fed. R. App. P. 22(b) (1). This court, having rendered the challenged judgment in the case at bar, is guided by 28 U.S.C. § 2253(c) (2) which directs the reviewing judge to determine if "the applicant has made a substantial showing of the denial of a constitutional right."

If a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, it must engage in a two-step process to determine whether a certificate should issue. Specifically, the court should grant a certificate only if it determines (1) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" and (2) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). When a district court has rejected a petitioner's constitutional claims on the merits, however, the petitioner must demonstrate only that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484.

III. Discussion

The Supreme Court has stated that under 18 U.S.C. § 2254(d)(1), a writ of habeas corpus may only issue with respect to claims which were adjudicated on the merits in state court when the state court decision resulted in a decision that (1) "was contrary to clearly established Federal law, as

determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A. Claim I: Insufficient Evidence

Petitioner first claims that there was insufficient evidence to support her convictions for health care and Medicaid fraud. Petitioner argues that there was insufficient evidence that she knowingly submitted false Medicaid and health care claims because 1) it was undisputed that Petitioner was not involved in preparing the billings, or in the claims submission process in general and 2) there was insufficient evidence presented for a rational jury to conclude that Petitioner knew the claims in question were false.

When a state prisoner challenges her conviction in a federal habeas corpus proceeding on the ground that the jury's verdict was not supported by sufficient evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *see also, Warren v. Smith,* 161 F.3d 358, 360 (6th Cir. 1998).

As stated in the September 25 Order, Petitioner's insufficiency of the evidence claim does not merit habeas relief. A reasonable jury could have found that there was sufficient evidence that Petitioner had knowledge of facts such that she knew or should have known that the claims in

question were false claims. Accordingly, the Michigan Court of Appeals decision that sufficient evidence was presented showing that all of the essential elements of Medicaid and Health Care fraud were proven beyond a reasonable doubt was a reasonable application of controlling federal law. The court finds that reasonable jurists could not debate this finding, and as such, the court declines to issue a certificate of appealability.

B. Claim II: Improper denial of separate trials or separate juries

In her second habeas claim, Petitioner contends that she was denied her rights under the Confrontation Clause by being tried jointly before the same jury with her husband, office manager, and co-defendant, Edgardo Perez. Petitioner contends that, despite being instructed not to consider against her evidence admitted against Perez, the jury could not have helped but considered as evidence of her guilt the testimony of various witnesses reiterating a number of inculpatory out of Court declarations made by Perez.

As stated in the September 25 Order, Petitioner's right of confrontation was not violated by her joint trial with her nontestifying codefendant, Edgardo Perez, and she was not denied a fair trial by the trial court's denial of her motions for severance and/or separate juries. The Michigan Court of Appeals decision denying Petitioner's Confrontation Clause claims was a reasonable application of controlling federal law. Therefore, the court denied Petitioner's habeas claim challenging the trial court's decision to deny her motions for a separate trial and/or jury. The court finds that. reasonable jurists could not debate this conclusion, and, therefore, the

court declines to issue a certificate of appealability on this issue.

C. Claim III: Denial of Jury Instructions on Specific Intent

Petitioner's third claim for habeas relief is that she was denied a fair trial by the trial judge's refusal to instruct the jury that the Medicaid and health care fraud charges required proof of a specific intent to commit these crimes. As stated in the September 25 Order, the trial court's instructions adequately informed the jury of the statutory mental element to convict Petitioner of Medicaid and health care fraud.[1]

The trial judge's instructions tracked the relevant statutes. Both the Medicaid False Claim Act and the Health

---

[1] The trial judge instructed the jury as follows:

> Defendant must have acted knowing that the claim was false. "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is 'aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid or healthcare benefit. "Knowing" or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

Velez-Ruiz, 224 Mich. App. 43, 53 (1997); (Tr. Vol. F at 1349-50).

Care False Claim Act state that a person shall not make a claim "knowing the claim to be false." M.C.L. § 400.602(d); M.C.L. § 752.1002(c). Both Acts define knowing and knowingly as the defendant being in "possession of facts under which he or she is aware or should be aware of the nature of his or her conduct." M.C.L. § 400.602(f); M.C.L. § 752.1002(h).

Petitioner's jury was instructed that, in order to convict, it must find that Petitioner acted knowing that a claim was false. The jury was further instructed that "knowing" included being in possession of facts from which the Petitioner should have been aware of the nature of her conduct. This instruction was consistent with the *mens rea* element set forth in the relevant statutes by the Michigan legislature and with the Michigan courts' determination that guilty knowledge includes constructive knowledge. To the extent that Petitioner challenges the *mens rea* element established by the state statutes and the Michigan courts' interpretation of those statutes, her claim is not cognizable in federal habeas corpus. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Coe v. Bell,* 161 F.3d 320, 347 (6th Cir. 1999).

To the extent that Petitioner contends that the Due Process Clause prevents the state from convicting her of Medicaid and health care fraud on the basis of constructive guilty knowledge, or because she was in possession of facts under which she should have been aware that false claims were being presented, Petitioner is mistaken. "There are numerous criminal statutes providing criminal liability where the mens rea element is 'reason to know.' We find that the reason to know standard is constitutionally sufficient as a

basis for criminal liability." *United States v. Wuliger*, 981 F.2d 1497, 1503 (6th Cir. 1992). Therefore, Petitioner's claim that the jury instructions on the *mens rea* element of her crimes was unconstitutional lacks merit.

The court concludes that reasonable jurists could not debate the finding that Petitioner's third claim for habeas relief lacks merit. Accordingly, the court declines to issue a certificate of appealability.

D. Claim IV: Lack of a *mens rea* element in offenses in question

Petitioner's fourth claim is that if the Medicaid and health care fraud statutes do not establish "crimes of specific intent, then the conviction offenses are unconstitutional, because neither contains an element of *mens rea.*" Petitioner argues inconsistently that, because the statutes and their interpretation allow conviction without proof of an "actual intent to defraud nor actual knowledge of the false claim," the conviction offenses are unconstitutional strict liability crimes having no mental element and that "a finding of guilt may be predicated upon mere negligence." As stated in the September 25 Order, neither of these arguments entitle Petitioner to habeas relief.

Petitioner's argument that the Michigan legislature and courts have made Medicaid and health care fraud strict liability crimes is plainly mistaken. The relevant statutes contain language establishing the *mens* rea elements of the crimes. Under both statutes, the prosecution must prove that the defendant presented or caused to be presented a claim for payment, knowing the claim to be false. The statutes further

establish that "'knowing' or 'knowingly' means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct . . ." M.C.L. § 400.602(f).

The statutes clearly set out a mental element which must be proven to convict. The statutes and the jury instructions given at trial cannot be reasonably construed to criminalize the mere presentation of any false Medicaid or healthcare claim without regard to the defendant's mental state. The court finds that reasonable jurists could not debate the fact that the statutes have not created strict liability crimes.

Petitioner contends also that the statutes (and the Michigan courts interpretation of them) allow the defendant to be convicted upon a finding of mere negligence. The court concludes that this argument does not entitle Petitioner to habeas relief for two reasons. First, while it may be a low level of criminal intent, negligence is a recognized criminal mental state. *Stanley v. Turner,* 6 F.3d 399, 404-05 (6th Cir. 1993) (mental element of negligence is sufficient to support conviction for involuntary manslaughter).

Second, the pertinent statutes (and jury instructions) do not establish a mental element of mere negligence for the crimes of conviction. The statutes establish a mental element of *actual knowledge of facts* (being "in possession of facts") under which a person knows or should know the nature of his or her conduct. The Michigan Court of Appeals ruled that, in the context of the charges at issue, the "'nature of his or her conduct' language in the 'knowing' definitions must refer to falseness. Accordingly, the actual or constructive knowledge

element of these offenses appropriately requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit." *Velez-Ruiz,* 224 Mich. App. 43, 49 (1997).

Therefore, the court concludes that reasonable jurists could not debate that Petitioner's fourth claim for relief does not warrant habeas relief. Petitioner's arguments that the conviction offenses are unconstitutional because they are either strict liability crimes or crimes for which the mental element is mere negligence clearly do not warrant habeas relief. As such, the court declines to issue a certificate of appealability on the issue.

E. Issue V: Vagueness challenge

Finally, Petitioner contends that the Medicaid and health care false claims are void for vagueness. "[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 n.7 (1989) (internal citations and quotations omitted).

The Michigan Court of Appeals ruled that the Medicaid and health care statutes provided fair notice of the

proscribed conduct in terms that a person of ordinary intelligence could understand and, therefore, were not void for vagueness. *Velez-Ruiz,* 224 Mich. App. 50-51. The statutes criminalize the knowing presentation of false claims. "Knowing" is defined as meaning that the person is in possession of facts such that he or she was aware or should have been aware of the nature of his or her conduct, i.e., was aware or should have been aware that the claims were false. As stated in the September 25 Order, the Michigan Court of Appeals' ruling that the statutes give fair notice of the actions rendered criminal is a reasonable application of controlling federal law.

Furthermore, the evidence produced at trial demonstrated that Petitioner is one to whose conduct the statute clearly applies; therefore, she cannot successfully challenge the statute for vagueness. Consequently, for the above stated reasons, the court concludes that reasonable jurists could not debate that Petitioner's vagueness challenge to the Medicaid and health care false claims statutes should be denied. Accordingly, the court declines to issue a certificate of appealability on Petitioner's fifth claim.

IV. Conclusion

The court concludes that Petitioner's conviction and sentence involve a judgment which is neither contrary to, or an unreasonable application of, clearly established federal constitutional law, nor an unreasonable determination of the facts. The court finds that, as to all five of Petitioner's claims, reasonable jurists could not debate that Petitioner is not entitled to habeas corpus relief.

Accordingly, IT IS ORDERED that Petitioner is DENIED a certificate of appealability.

/s/ _____
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: November 21, 2001

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 98-CV-75582-DT

[Filed September 25, 2001]

WANDA VELIZ-RUIZ, Petitioner,	)
v.	)
GAIL ANNE TRIMBLE, Respondent.	)

ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

I. Introduction

Pending before the court is Petitioner, Wanda Veliz-Ruiz's *("Veliz-Ruiz"* or "Petitioner") application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which she alleges that she has been convicted and sentenced in violation of her constitutional rights. Specifically, Petitioner, a medical doctor, challenges her conviction after jury trial of multiple counts of filing false Medicaid claims, M.C.L. § 400.601 *et seq.* and false health care claims, M.C.L. § 752.1001, *et seq.*

On January 5, 1994, Petitioner was sentenced to five years probation, 500 hours of community service, $11,343.63 in restitution, fines of $25,000.00, prosecution costs of $1,497.00, and a victim's rights fee of $30.00. According to Petitioner, she remains on probation because she has been unable to fully pay all of her restitution, costs, and fines. Petitioner further asserts that she is "under a continuing threat of incarceration for violation of her probation, in order to compel payment of the fine, costs, and restitution imposed as conditions of her probationary sentence." (Pet. at 3.) For the reasons set forth below, the petition shall be denied.

II. Factual Background

Petitioner and her co-defendant, Edgardo Perez-DeLeon ("Perez-DeLeon"), were charged with and convicted of filing false Medicaid and health care claims. Perez-DeLeon was Petitioner's husband and the office manager of her medical practice. The Michigan Court of Appeals found that:

> These convictions arose from defendants improperly billing Medicaid, Medicare, and Blue Cross Blue Shield of Michigan (BCBSM) for office visits when patients were not in the office.

People v. Velez-Ruiz, 224 Mich. App. 43, 45 (1997).

Evidence was presented that Petitioner was a participating provider with BCBSM, Medicare Part B, and Medicaid. Claims under these programs were submitted electronically to Medicaid and BCBSM through *"Diversitech,"* a medical billing company. Claim information

was entered into a computer at Petitioner's office by clerical employees, and Petitioner signed and submitted a form indicating that she authorized Diversitech to submit claims for her electronically.

Coding and billing of ancillary or peripheral services such as reporting telephone prescriptions, making referral appointments, and preparing disability forms or letters as office visits occurred one thousand three hundred and fifty-seven times in Petitioner's office in 1990. Eight hundred and twenty of these claims were filed on behalf of Petitioner.[1] Trial Transcript B ("Tr. B") at 327-33).

Expert testimony showed that ancillary or peripheral services such as scheduling referral appointments, telephoning prescriptions to pharmacies; work, school and disability letter reviews, and signing forms were not covered benefits under the Medicaid program, Trial Transcript Volume I at 100-01. These services would not be properly billed under office service codes numbered 90050-90070 because other code numbers exist for these services.[2] Expert testimony also

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[1] The remaining five hundred and thirty-seven claims were filed on behalf of Dr. Robert Benejam, a pediatrician who worked at the same location and whose billing was also supervised by Perez-DeLeon.

[2] Expert testimony was presented in great detail about the precise way claims are presented for payment to the State and private bodies responsible for administering the Medicaid, Medicare, and BCBSM programs. It was explained that a claim is a request for payment and that, to facilitate the submission, evaluation and payment (or rejection) of the vast numbers of claims submitted, various services--from a physician office visit to different types of

indicated that there must be a physical examination and a history taken from a patient on the day in question before office service codes may be properly billed to BCBSM for treating the patient that day. For example, Patricia Helwig of BCBSM testified that, in twenty-one years of conducting audits of health care, she had never before encountered a medical provider who suggested that office service codes could be properly billed without a patient being treated in the office on the day for which an office service code billing was submitted.

Further, expert testimony indicated that, to become a participating provider in these plans, licensed health care providers must sign forms indicating that they have read the program manuals and that they agree to abide by the terms and conditions of the program, including those governing the form in which claims are presented and those governing what constitutes a covered service. Petitioner signed the appropriate forms to become a participating provider in the Medicaid, Medicare, and BCBSM plans, and authorized Diversitech to submit claims to the appropriate agencies on her behalf. Providers are informed that using the services of a billing company does not insulate them from responsibility for the validity of the claim information which they provide to the billing company.

In Petitioner's practice, after a patient was seen during an office visit, an appropriate office visit claim would be

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surgical procedures--have been assigned codes numbers, so that *numbers,* rather than mere verbal *descriptions,* may be entered into claim forms and processed.

submitted for payment. Later, when a telephone prescription was submitted, a referral appointment made, or other peripheral service rendered, an additional, inappropriate office visit claim would be submitted for the same patients, without an additional office visit having been provided. Office employees prepared billing invoices even if only ancillary services were performed. (Tr. Vol. B at 390-412). While Perez would generally assign the codes to these services for billing purposes, there was also testimony that Petitioner agreed to suggestions by Perez to change from non-reimbursable diagnosis codes to reimbursable codes. (*Id* at 403-05). Further, evidence was presented that Petitioner sometimes assigned procedure and diagnosis codes to billing invoices. (Tr. Vol. III at 438-42). Thus, there was evidence that Petitioner on some occasions marked billing invoices with procedure and diagnosis codes before Perez finally submitted the invoices.

Office employees testified that they were instructed by Petitioner and Perez not to document follow-up appointments because of billing ramifications.

Dr. Roberto Benejam, who was in practice in Petitioner's office during 1990, testified that Perez informed him the office was going to start billing for reviewing consultation letters and that Petitioner apparently heard this conversation. (Tr. Vol. D at 687-91).

James Clickner, a Special Agent for the Attorney General testified that he questioned Perez and Petitioner about whether they were aware that office visit billings had been submitted when the only services provided were telephone prescriptions, signing forms, reviewing letters, and making

referral appointments. Petitioner indicated that she knew this and that she had been placing diagnosis codes on the invoices. (Tr. Vol. D at 803-05).

Petitioner testified on her own behalf and said that she had obtained her medical degree at the University of El Caiibe in San Juan, Puerto Rico, where the medical textbooks were in English. The University of El Caiibe is accredited by the American Medical Board of Accreditation, the same board which accredits medical schools in the continental United States. Petitioner performed her three year internal medicine residency in the United States at various hospitals in Detroit, Michigan, in a Wayne State University Medical School affiliated program. Petitioner testified that she delegated full responsibility for billing matters to Perez, her husband and office manager, and claimed that she had had no personal involvement in the submission of bills or billing invoices. (Tr. Vol. E at 1049-1103).

Petitioner denied having knowingly submitted any false claims for payment, but acknowledged signing forms that she understood the billing procedures of the insurance programs to which she submitted claims and that she assumed responsibility for the accuracy of claims submitted on her behalf.

III. Procedural History

Petitioner was convicted of thirteen counts of Medicaid fraud, M.C.L. § 400.601 *et seq.* and Health Care fraud, M.C.L. § 752.1001 *et seq.* She was sentenced to five years probation, restitution, costs, and fines. Petitioner was on probation at the time of the filing of the present petition.

Petitioner filed a direct appeal, presenting the following claims:

> I. The statutes under which she was convicted were unconstitutionally vague.
>
> II. The manuals delineating the proper procedural billing codes were so vague that they rendered the statutes unconstitutionally vague.
>
> III. The trial court deprived Petitioner of a fair trial by refusing to instruct the jury on specific intent.
>
> IV. The trial court erred by admitting evidence that showed 1,357 instances of erroneous billing similar to the instances forming the basis of the charges against Petitioner.
>
> V. Petitioner's convictions are supported by insufficient evidence.
>
> VI. Petitioner was denied a fair trial by the trial court's denial of her motion for a severance and a separate jury.

The Michigan Court of Appeals affirmed Petitioner's convictions in a published opinion. *People v. Velez-Ruiz,* 224 Mich. App. at 61. Petitioner filed a motion for rehearing which was denied. *People v. Velez-Ruiz,* Michigan Court of Appeals Docket No. 172757 (August 26, 1997). The Michigan Supreme Court denied Petitioner's delayed

application for leave to appeal. *People v. Velez-Ruiz,* Michigan Supreme Court Docket No. 110757 (March 31, 1998).

Thereafter, Petitioner, through counsel, filed the instant petition for a writ of habeas corpus presenting the following five claims:

> I. Petitioner's convictions are supported by insufficient evidence.
>
> II. Petitioner should have been granted a separate trial, because evidence of her co-defendant's guilt was unfairly prejudicial.
>
> III. Petitioner was denied a fair trial by the trial court's refusal to instruct the jury on specific intent and by the jury instructions given concerning the mental elements of the crimes charged.
>
> IV. If Petitioner's conviction offenses are not specific intent crimes, the convictions are unconstitutional because the offenses do not contain a mens rea element.
>
> V. The statutes under which Petitioner was convicted are unconstitutionally vague, because they fail to give adequate notice of the conduct proscribed.

IV. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA" or "the Act"), govern this case because Petitioner filed her habeas corpus petition after the effective date of the Act. *Lindh v. Murphy,* 520 U.S. 321 (1997). The AEDPA altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus. As amended, 28 U.S.C. § 2254(d) provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The United States Supreme Court has recently addressed the question of the proper interpretation of the amendments to the habeas corpus statute concerning

entitlement to relief. The Supreme Court has stated that "[i]n sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor,* 120 S.Ct. 1495, 1523 (2000). The Supreme Court summarized the standard of review as follows:

> Under § 2254(d) (1), the writ may issue only if one of the following two conditions is satisfied-the state-court adjudication resulted in a decision that (1) "was contrary to clearly established Federal law, as determined by the Supreme Court of the United States," or {2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 120 S.Ct. at 1523.

"[A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams,* 120 S.Ct. at 1521. The reviewing court should not inquire whether all reasonable jurists would agree that the state court's decision was reasonable or unreasonable. The reviewing court must be aware that *"an* unreasonable application of federal law is different from an incorrect application of federal law." *Williams,* 120 S.Ct. at 1522. However, a postulated complete unanimity of the entire federal judiciary that a state court decision is unreasonable is not required before the reviewing court may conclude that the decision in question includes at least one dispositive unreasonable application of clearly established federal law.

Where constitutional trial error has been shown and the reviewing court concludes that the error had a substantial and injurious effect or influence in determining the jury's verdict, a state court ruling finding such error harmless beyond a reasonable doubt is outside the realm of plausible, credible' outcomes and the Petitioner is entitled to habeas relief. *Barker v. Yukins,* 199 F.3d 867 (6th Cir. 1999), *cert. denied,* 120 S.Ct. 2658 (2000). "[A] state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible, credible outcomes." *Barker,* 199 F.3d at 871. "When a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch,* 513 U.S. 432, 445 (1995). "Only if a federal habeas court can say with certainty that a trial error had little or no impact on the judgment, should the judgment stand." *Barker,* 199 F.3d at 873. The federal court

reviewing a habeas petition must apply the presumption of correctness to evidence-supported factual determinations made by a state court. *West v. Seabold,* 73 F.3d 81, 83 (6th Cir. 1996); *cert denied* 518 U.S. 1027 (1996); *Lundy v. Campbell,* 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied,* 495 U.S. 950 (1990). This presumption may only be overcome by the presentation of clear and convincing evidence by the Petitioner. 28 U.S.C. § 2254(e)(1).

V. Analysis

A. Claim I-Insufficient Evidence

Petitioner first claims that there was insufficient evidence to support her convictions for health care and Medicaid fraud. Petitioner argues that there was insufficient evidence that she knowingly submitted false Medicaid and health care claims because 1) it was undisputed that Petitioner was not involved in preparing the billings, or in the claims submission process in general and 2) there was insufficient evidence presented for a rational jury to conclude that Petitioner knew the claims in question were false.

When a state prisoner challenges her conviction in a federal habeas corpus proceeding on the ground that the jury's verdict was not supported by sufficient evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). *See also, Warren v. Smith,* 161 F.3d 358, 360 (6th Cir.1998).

The Due Process Clause of the Fourteenth Amendment protects an accused in a criminal case against conviction except upon proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). The appropriate standard of review in a federal habeas corpus proceeding involving a claim of insufficiency of evidence in a state criminal conviction is whether, after reviewing the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. at 319. *United States v. Comer,* 93 F.3d 1271, 1275 (6th Cir. 1996). This standard of review recognizes the trier of fact's responsibility to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson,* 443 U.S. at 318.

The reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the finder of fact. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *Marshall v. Lonberger,* 459 U.S. 422, 434 (1983); *Kines v. Godinez,* 7 F. 3d 674, 678 (7th Cir. 1993); *cert denied,* 510 U.S. 1200 (1994). Determination of the credibility of a witness is within the sole province of the finder of fact and is not subject to review. *United States v. Saunders,* 886 F 2d 56 (4th Cir. 1989). The habeas court does not substitute its judgment for that of the jury. *United* States *v. Jackson,* 55 F.3d 1219, 1225 (6th Cir. 1995).

The habeas court must review all of the evidence in the record and determine whether a rational finder of fact could have found guilt beyond a reasonable doubt. "The evidence must afford a substantial basis from which a fact in issue can

reasonably be inferred." *Spalla v. Foltz,* 615 F.Supp. 224, 227 (E.D. Mich. 1985), *aff'd,* 788 F.2d 400 (6th Cir.), cert. *denied,* 479 U.S. 935 (1986). Circumstantial evidence from which a reasonable inference of guilt beyond a reasonable doubt may be drawn is constitutionally sufficient. *Id.; Evans-Smith v. Taylor,* 19 F.3d 899, 909 (4th Cir.), *cert. denied,* 513 U.S. 919 (1994). Furthermore, "it is worth noting that circumstantial evidence need not exclude every reasonable hypothesis of innocence" to be constitutionally sufficient. *Id.* "[T]he record evidence need not be absolute in convincing the trier of fact of the defendant's guilt or culpability beyond a reasonable doubt. A conviction may rest on circumstantial evidence and a federal habeas court need not rule out all possible interpretations of the circumstantial evidence." *Jamison v. Collins,* 100 F.Supp. 2d 647, 705 (S.D. Ohio 2000).

The *Jackson* standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Jackson,* 443 U.S at 324, n.16.

Petitioner's insufficiency of the evidence claim does not merit habeas relief.

The Medicaid False Claim Act ("MFCA") provides that:

> A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act upon or against the state knowing the claim to be false. M.C.L.§ 400.607(1).

The elements of Medicaid fraud are: 1) the existence of a claim, which is a request for payment for services rendered, 2) which the defendant makes, presents, or causes to be made or presented to the state or its agent, 3) which claim is made under the social welfare act, M.C.L. 400.1 *et seq.*, 4) which claim is false, fictitious, or fraudulent, and 5) the defendant knew the claim was false, fictitious, or fraudulent. *In re Wayne County Prosecutor,* 121 Mich. App. 798, 801-02 (1983); *People v. Orzame,* 224 Mich. App. 551, 557 (1997); M.C.L. § 400.607(1).

The Health Care False Claims Act ("HCFC") provides that:

> A person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payment of health care benefits knowing the claim to be false. M.C.L. § 752.1002(c).

The elements of health care fraud are the same as the elements of Medicaid fraud, except that health care claims are made or presented to a health care corporation or insurer under the statutory provisions pertinent to those entities.

In the present case, it is undisputed that Medicaid and health care claims were presented under the appropriate statutes to the appropriate bodies for reimbursement.

M.C.L. § 400.602(d) defines "false" as "wholly or partially untrue or deceptive." It was established by overwhelming evidence that 1) ancillary or peripheral services such as telephoning prescriptions to pharmacies and preparing

or signing disability letters were not separately reimbursable claims under the Medicaid and health care insurance statutes and that such peripheral or ancillary services were not to be separately billed under office visit codes. It was also established by overwhelming evidence that Petitioner's office did indeed submit substantially more than a thousand such claims for payment for peripheral or ancillary services under office visit codes in just one year, an average of more than five per day. Further, there was evidence that these claims for peripheral services submitted under office visit codes were submitted in addition to and after a claim for an office visit had previously been *submitted,* based on the same office visit which gave rise to the peripheral services. Therefore, overwhelming evidence was presented that the one thousand three hundred and fifty-seven claims for payment for peripheral or ancillary services billed as office visit claims were false claims, i.e., claims "wholly or partially deceptive."[3]

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[3] Petitioner asserts that she has not been convicted of double billing or billing for services not provided. This assertion will not stand careful scrutiny. It is true that Petitioner was not convicted of billing for a medical service such as a chest x-ray or immunization which was not provided, or for treating a non-existent patient. Nor was Petitioner convicted of submitting multiple identical bills for the identical service provided. However, Petitioner was convicted of submitting separate, additional claims for office visit payments for peripheral services which expert testimony established should be performed as part of the covered office visit. Petitioner's office would *first* bill for the office visit. Payment for this office visit claim included payment for ancillary or peripheral services which might be provided, regardless of when or whether they were performed. That is, since some, but not all, office visits involve performance of ancillary or peripheral services, payment for an

The evidence that Petitioner presented or caused the presentation of improper claims was not overwhelming, but was strong. Petitioner admitted reading and signing provider agreements with Medicaid and BCBSM in which she promised to learn and follow appropriate billing procedures when making claims for services rendered. Petitioner contracted with Diversitech to have her claims submitted electronically. Petitioner's agreement with Diversitech also put her on notice that electronic submission of claims would create a presumption that she intended to file the claims so submitted and that she was responsible for providing the appropriate billing and diagnostic codes to Diversitech. There was testimony from office employees and Petitioner herself that 1) Petitioner at times provided procedure billing codes as well as diagnostic codes, including examples where office procedure codes were used to bill for ancillary services (Tr. Vol. F at 1158-62), 2) Petitioner signed the relevant agreements with Medicaid, BCBS, and Diversitech, 3) Petitioner had the appropriate billing procedure manuals in her possession, and

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office visit includes some amount which is an averaged compensation for such services.

After first billing for the actual office visit, Petitioner's office would, based on the same single office visit, submit another office visit bill for a related peripheral service performed at a later date, such as preparing or signing a disability letter or making a referral appointment. Thus, in fact, Petitioner was convicted of a form of double or multiple billing. This double or multiple billing was accomplished by submitting two or more "office visit" claims based upon a single office visit. This form of double or multiple billing consisted of separately billing for peripheral services which were already compensated for when the first office visit claim was paid.

4) Petitioner was the ultimate authority regarding the business transacted in her clinic.

Therefore, this Court concludes that sufficient evidence was presented for a rational jury to conclude that Petitioner submitted or caused to be submitted the improper claims in question. The fact that clerical-administrative employees and office manager Perez did the great majority of the clinic's work in the claims submission process and that the third party Diversitech submitted the claims electronically to Medicaid and BCBSM does not absolve Petitioner of her role in the claims submission process.[4]

Petitioner also argues that insufficient evidence was presented for a rational jury to conclude that she was aware that false claims had been submitted.

At issue is whether Petitioner knowingly submitted false claims. The relevant statutes define "knowingly" as meaning:

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[4] A principal purpose of the Medicaid and health care false claims statutes is to conserve scarce taxpayer and private resources devoted to health care expenditures by providing a deterrent to the submission of false claims. Doctors are generally the most highly compensated employees or entrepreneurs in an enterprise providing medical care. It would be contrary to the purpose of the statutes, to promoting ordinary principles of effective law enforcement, and to common sense for courts effectively to immunize medical doctors from prosecution for submitting or causing to be submitted false Medicaid or health care claims simply because they commonly (and sensibly) employ lower-paid clerical employees and/or office managers to actually submit the claims information.

> that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid [or health care] benefit. "Knowing" and "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

M.C.L. § 400.602(d)and (f); M.C.L. § 752.1002(c) and (h).

Petitioner admitted having signed the required Medicaid and BCBSM provider forms obligating her to familiarize herself with billing procedures and assume responsibility for submitting only legitimate claims supported by correct information. Petitioner also admitted being in possession of the appropriate provider manuals setting forth the pertinent billing procedures. She read, wrote and spoke English. The Michigan courts have found that "if a defendant contractually agrees to abide by billing procedures and has access to the applicable manuals and documentation controlling those procedures, deviations from the established procedures are presumed to be intentional or provide evidence that the defendant knew the submitted claims were false." *Orzame,* 224 Mich. App. at 559. Therefore, the fact that Petitioner signed the appropriate provider forms and possessed the appropriate billing procedure manuals is evidence that she knew claims submitted in violation of the procedures prescribed in the manuals were false.

Further, evidence was presented that Petitioner told Agent James Clickner that she was aware that office visit billings or claims had been made for peripheral or ancillary services. Expert testimony established that such claims were improper and fraudulent and that this was explained in the manuals Petitioner admitted she possessed. Dr. Roberto Benejam also testified that Petitioner was present and within easy listening distance when Perez stated that the office would be billing for reviewing consultation letters.

Additionally, the large number of claims for "office visits" made when only "ancillary or peripheral services" were provided, together with the expert testimony establishing that such claims were improper and fraudulent, was strong circumstantial evidence of a pattern of knowing behavior that those responsible for submitting these claims, including Petitioner, were aware or should have been aware of the fraudulent nature of their conduct. While the record does not set forth what percentage of the total number of claims submitted by Petitioner's office in 1990 were false, it is clear to this court that one thousand three hundred and fifty-seven improper claims was a not-insubstantial number of claims for Petitioner's two-doctor medical practice for that year. In other words, these facts did not require the jury to infer awareness of wrongful intent in part from the presentation of a mere handful of improperly submitted claims out of vastly larger group of properly submitted claims. Rather, the presentation of this number of improper claims in one year by a two-doctor practice could easily indicate a systematic or persistent tendency to submit false claims from which a wrongful, fraudulent intent may reasonably be inferred.

Consequently, the court concludes that a reasonable jury could have found that there was sufficient evidence that Petitioner had knowledge of facts such that she knew or should have known that the claims in question were false claims. Accordingly, the Michigan Court of Appeals decision that sufficient evidence was presented showing that all of the essential elements of Medicaid and Health Care fraud were proven beyond a reasonable doubt was a reasonable application of controlling federal law. Petitioner's sufficiency of the evidence claims are therefore denied.

B. Claim II-Improper denial of separate trials or separate juries

Petitioner contends that she was denied her rights under the Confrontation Clause by being tried jointly before the same jury with her husband, office manager, and co-defendant, Edgardo Perez. Petitioner contends that, despite being instructed not to consider evidence admitted against Perez against her, the jury could not have but considered as evidence of her guilt the testimony of various witnesses reiterating a number of inculpatory out of court declarations made by Perez.

Perez did not testify. Hence, he was unavailable for cross-examination. Various witnesses, both clinic employees and government investigators, recounted statements they said Perez made to them which indicated or might support an inference that he knew false claims had been submitted.

For instance, investigator Joanne Lynn testified that Perez admitted that he billed using office visit codes when he knew that only ancillary services not involving an additional

office visit had been rendered and that he knew this was wrong. (Tr. Vol. B at 346-50). Employee Santa Delvalle testified that Perez had pressed her to reveal whether she had spoken with investigators and told her that he had information which might be used against her, such as the fact that she had received public assistance while employed. Delvalle also testified that Perez advised employees that they did not have to speak to investigators, and if they did, that they should only do so in the presence of an attorney, or should invoke the Fifth Amendment. Investigator Lee Juarez testified that Perez told him that he had to use his imagination to keep Petitioner's medical practice alive, (Tr. Vol. C at 607) and he did not abuse the Medicaid and BCBSM system a lot. (*Id.* at 633-34). Sandra Reyes, another clinic employee, testified that Perez told her that she should not tell investigating agents anything. (Tr. Vol. V at 608, 611).

Petitioner argues that her rights under the Confrontation Clause as articulated by *Bruton v. United* States, 391 U.S. 123 (1968) and its progeny were violated by her joint trial with her co-defendant, office manager, and husband, Edgardo Perez. Petitioner maintains that, because Perez was both Petitioner's office manager and her husband, "it was inevitable" that the jury would attribute guilty knowledge to Petitioner on the basis of Perez's inculpatory statements. Petition at 26.

In *Bruton,* the United States Supreme Court held that a defendant's rights are violated "under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v.*

Marsh, 481 U.S. 200, 201 (1987). In *Bruton,* the nontestifying codefendant's confession expressly implicated the defendant as his accomplice. Therefore, there was no doubt that the confession was "powerfully incriminating" evidence of the defendant's guilt. *Richardson,* 481 U.S. at 208 (quoting *Bruton,* 391 U.S. at 135). However, in *Richardson,* the Supreme Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to her existence.

"Where the extrajudicial statement does not clearly implicate defendants other than the declarant, then the confrontation clause may not be offended by the unavailability of cross-examination." *Hodges v. Rose,* 570 F.2d 643, 645 (6th Cir. 1978). Where the inculpatory extrajudicial statements in no way implicate the other defendant, they are not powerfully incriminating against the other defendant and their admission at a joint trial generally do not violate the co-defendant's confrontation rights. *Id.* at 646.

In the present case, the inculpatory extrajudicial statements attributed to Perez did not inculpate Petitioner. Not a single witness testified that Perez said anything indicating that Petitioner was aware that false claims had been presented. Nor did any of the witnesses say that Perez had claimed Petitioner had instructed or authorized him to file false claims, or ratified any decision on his part to do so. No witness testified that Perez said Petitioner instructed him to attempt to obstruct the investigation of the legitimacy of the office's Medicaid and BCBSM claims. On the contrary, the witnesses all testified that Perez said he was aware false claims had been

filed and that Perez had told them not to cooperate with the investigation. Thus, all of the extrajudicial statements which the various witnesses attributed to Perez inculpated Perez alone.

It is undisputed that the trial court instructed the jury not to consider any of Perez's inculpatory statements as evidence of Petitioner's guilt. (Tr. Vol. F at 1341-43). Under the circumstances of this case, where Perez's extrajudicial statements did not inculpate Petitioner, the overwhelming probability of jurors' inability to disregard incriminating inferences that is the foundation of *Bruton* is absent. *Richardson,* 481 U.S. at 208-09. Consequently, the court concludes that Petitioner's right of confrontation was not denied by her joint trial with Perez.

Joint trials "play a vital role in the criminal justice system." *Zafiro v. United States,* 506 U.S. 534, 537 (1993). Joint trials promote economy and efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent trials." *Richardson,* 481 U.S. at 209. The fact that evidence against one defendant is more incriminating than that against another is not, standing alone, a basis for severance. *United States v. Dill,* 693 F.2d 1012 (10th Cir. 1982). A complaint such as Petitioner's that a *"spillover"* of guilt will flow from one defendant to another against whom the evidence may be weaker is insufficient to require severance. *United States v. Hack,* 782 F.2d 862, 870 (10th Cir. 1986). "Nor does the fact that a defendant is married to a codefendant necessitate severance." *United States v. Walters*, 188 F.R.D. 591, 598 (D. Kan. 1999).

Both Petitioner and Perez denied that they knowingly filed false Medicaid and health care claims. Perez's defense stressed his assertion that it was so difficult for him to determine which services were properly billed as office visit services and which were not that there was a reasonable doubt whether he knowingly filed false claims. Petitioner's defense stressed her assertion that she had nothing to do with the claims billing process and that she had delegated all authority over these matters to Perez.[5]

These defenses were not inherently antagonistic. These defenses are not so contradictory that the jury must necessarily have disbelieved one to believe the other.

On the contrary, the jury could have found both that Perez did not knowingly file false claims because any improper filings he performed or supervised were mere mistakes and that Petitioner did not knowingly file false claims because she had no role or responsibility in the claims filing process at all. The jury, however, did not so find. Further, to the extent that Perez's and Petitioner's defenses were contradictory, Petitioner sought to cast the blame on Perez by denying that she had anything to do with the claims submission process. None of the inculpatory extrajudicial statements attributed to Perez undermined this main aspect of Petitioner's defense in any way.

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[5] Petitioner's defense also supported Perez's contention that determining which services could be properly billed under office visit codes was sufficiently complex and confusing to create a reasonable doubt as to whether false claims were knowingly filed.

The court concludes that Petitioner's right of confrontation was not violated by her joint trial with her nontestifying codefendant Edgardo Perez and that she was not denied a fair trial by the trial court's denial of her motions for severance and/or separate juries. The Michigan Court of Appeals decision denying Petitioner's Confrontation Clause based claims was a reasonable application of controlling federal law. Therefore, Petitioner's habeas claim challenging the trial court's decision to deny her motions for a separate trial and/or jury is denied.

C. Claim III-Denial of Jury Instructions on Specific Intent

Petitioner contends that she was denied a fair trial by the trial judge's refusal to instruct the jury that proof of Medicaid and health care fraud required proof of a specific intent to commit these crimes.[6]

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[6] Petitioner requested the following instructions on specific intent: "(1)The crimes charged require proof of a specific intent. This means that the prosecution must prove not only that the defendants did certain acts, but that they did the acts with the intent to cause a particular result. (2) For the crimes charged this means that the prosecution must prove that defendant intended to file false Medicaid and health care claims. (3) The defendant's intent may be proved by what he or she said, what he or she did, how he or she did it, or by any other facts and circumstances in evidence." Petition at 27.

The trial judge instructed the jury as follows:

> Defendant must have acted knowing that the claim was false. "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid or healthcare benefit. "Knowing" or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

Velez-Ruiz, 224 Mich. App. at 53; (Tr. Vol. F at 1349-50).

The trial judge's instructions tracked the relevant statutes. Both the Medicaid False Claim Act and the Health Care False Claim Act state that a person shall not make a claim "knowing the claim to be false." M.C.L.§ 400.602(d); M.C.L. § 752.1002(c). Both Acts define knowing and knowingly as being "possession of facts under which he or she is aware or should be aware of the nature of his or her conduct." M.C.L. § 400.602(f); M.C.L. § 752.1002(h).

Petitioner contends that, by refusing to give the requested specific intent instruction and instructing the jury that guilty knowledge could be found if the defendant should have been aware of the nature of her conduct, the trial court's instructions improperly allowed the jury to convict Petitioner on a finding of mere negligence. In essence, Petitioner argues that she was constitutionally entitled to have the jury

instructed that she could only be convicted upon a finding that she had actual knowledge that false claims were presented and actual knowledge of the illegality of her actions. The court is not persuaded that this claim entitles Petitioner to relief for several reasons.

"The definition of the elements of a criminal offense is entrusted to the legislature . . . " *Liparota v. United States*, 471 U.S. 419, 424 (1985). In general, crimes which are codifications of the common law must contain a mental element of some form of guilty knowledge or *mens* rea which will be implied by the courts if it has been omitted from the relevant statute. *Morissette v. United States;* 342 U.S. 246, 249-53 (1952). In the case at bar, the relevant statutes contain a mental element of guilty knowledge, knowledge of the facts that false claims were presented.

The Michigan courts have determined that "[g]uilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred." *People v. Tantenella,* 212 Mich. 614, 621 (1920) (conviction for receiving stolen goods may be supported by constructive knowledge the goods were stolen). Thus, "[g]uilty knowledge need not be proven directly, but may be inferred from other facts and circumstances." *People* v. Starks, 107 Mich. App. 377, 385 (1981) (same) . This is not remarkable or inherently unfair proposition, as "[c]ircumstantial evidence is typically sufficient to permit an inference of criminal knowledge." *United States v. Bronx Reptiles, Inc.,* 217 F.3d 82, 89 (2nd Cir. 2000).

Petitioner's jury was instructed that it must find that Petitioner acted knowing that a claim was false to convict. The jury was further instructed that knowing included being in possession of facts from which she should have been aware of the nature of her conduct. This instruction was consistent with the *mens rea* element set forth in the relevant statutes by the Michigan legislature and the Michigan courts' determination that guilty knowledge includes constructive knowledge. To the extent that Petitioner challenges the *mens rea* element established by the state statutes as a matter of state law and the Michigan courts' interpretation of those statutes, her claim is not cognizable in federal habeas corpus. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Coe v. Bell,* 161 F.3d 320, 347 (6th Cir. 1999).

To the extent that Petitioner contends that the Due Process Clause prevents the state from convicting her of Medicaid and health care fraud on the basis of constructive guilty knowledge, or because she was in possession of facts under which she should have been aware that false claims were being presented, Petitioner is mistaken.

Petitioner argues that Medicaid and health care fraud are specific intent crimes requiring proof of actual knowledge of the falsity of the claims and that, consequently, refusing to give specific intent instructions was unconstitutional. "Failure to instruct on such an essential element as intent or knowledge requires reversal because the 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [s]he is charged.'" *United States v. Laughlin,* 26 F.3d 1523, 1527 (10th Cir. 1994) (quoting *In re*

Winship, 397 U.S. 358, 364 (1970). However, that does not mean Petitioner was entitled to the instruction she sought.

Petitioner's jury was instructed on the element of intent or knowledge required to convict. The jury was instructed that to convict it must find that Petitioner knew false claims were being presented and that this included knowing facts under which she should have been aware of the nature of her conduct, i.e., should have been aware that false claims were being presented. Thus, the jury was instructed that it could find guilty knowledge if it was proven that Petitioner knew facts which gave her reason to know that false claims were being presented. "There are numerous criminal statutes providing criminal liability where the *mens rea* element is 'reason to know.' We find that the reason to know standard is constitutionally sufficient as a basis for criminal liability." *United States v. Wuliger,* 981 F.2d 1497, 1503 (6th Cir. 1992).Therefore, Petitioner's claim that the jury instructions on the mens rea element of her crimes was unconstitutional lacks merit.

Further, the United States Supreme Court has stated that "[i]n a general sense, 'purpose' corresponds with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey,* 444 U.S. 394, 405 (1980). Therefore, the fact that the Medicaid and health care false claims statutes prohibit knowing presentation of false claims does not support Petitioner's argument that she was constitutionally entitled to specific intent instructions.

Additionally, "instructing in terms of 'specific intent' has been disfavored by the courts because of the confusing

and ambiguous nature of such an instruction." *Laughlin,* 26 F.3d at 1527 (citing *Liparota,* 471 U.S. at 433 n.16.) In *Liparota,* the Supreme Court stated that instruction on *'specific* intent' has been "criticized as too general and potentially misleading" and that Ia] more useful instruction might relate specifically to the mental state required [under the statute] and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" *Id.* This is further support for the trial court's decision to instruct the jury as it did on the mental state required to convict, rather than instructing on *"specific"* and/or "general" intent, and further support for the Michigan Court of Appeals' ruling affirming this instruction.

Finally, to warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991); *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977). If an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction improperly. *Estelle,* 502 U.S. at 72, 73 n.4.

The court concludes that the trial court's instructions adequately informed the jury of the mental element established by statutes which it had to find to convict Petitioner of Medicaid and health care fraud. Therefore, Petitioner's challenge to the jury instructions is denied.

D. Claim IV-Lack of a *mens rea* element in offenses in question

Petitioner contends that if the Medicaid and health care fraud statutes do not establish "crimes of specific intent, then the conviction offenses are unconstitutional, because neither contains an element of mens rea." Petition at 34. Petitioner argues inconsistently that, because the statutes and their interpretation allow conviction without proof of an "actual intent to defraud nor actual knowledge of the false claim," the conviction offenses are unconstitutional strict liability crime having no mental element and that "a finding of guilt may be predicated upon mere negligence." Petition at 37. Neither of these arguments entitle Petitioner to habeas relief.

Petitioner's argument that the Michigan legislature and courts have made Medicaid and health care fraud strict liability crimes in violation of *Morissette* and its progeny is plainly mistaken. The relevant statutes contain language establishing the *mens rea* elements of the crimes. Under both statutes, the prosecution must prove that the defendant presented or caused to be presented a claim for payment, knowing the claim to be false. The statutes further establish that "'knowing' or 'knowingly' means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct . . ." M.C.L. § 400.602(f). In other words, "knowing" presentation of a false claim may be proven by showing that the person presented (or caused to be presented) a claim *while actually knowing facts* which should have made the person aware that the claim was false. The statute adds that knowing does not include conduct which is an error or mistake unless such mistakes indicate a systematic or persistent tendency to cause such errors or

mistakes.

The statute clearly sets out a mental element which must be proven to convict. The statute and the jury instructions given at trial cannot be reasonably construed to criminalize the mere presentation of any false Medicaid or healthcare claim without regard to the defendant's mental state. Hence, the statutes have not created strict liability crimes.

Petitioner contends also that the statutes (and the Michigan courts interpretation of them) allow the defendant to be convicted upon a finding of mere negligence. The court concludes that this argument does not entitle Petitioner to habeas relief for two reasons. First, while it may be a low level of criminal intent, negligence is a recognized criminal mental state. *Stanley v. Turner,* 6 F.3d 399, 404-05 (6th Cir. 1993) (mental element of negligence is sufficient to support conviction for involuntary manslaughter). The Supreme Court has noted that many crimes lacking a mental element of actual intention may be supported by the mental state of negligence, citing such examples as "involuntary manslaughter or criminal negligence and the whole range of crimes arising from an omission of a duty." *Morissette,* 342 U.S. at 251 n.8. As the Michigan Court of Appeals noted, "[w]here, as here, claimants receive a steady flow of government money pursuant to claims prepared by the claimants themselves, they have an affirmative obligation to check the accuracy of their claims to avoid mistakes." *Velez-Ruiz,* 224 Mich. App. at 50. Thus, if Petitioner is correct that the Medicaid and health care fraud statutes criminalize negligent submission of false claims, this would not be constitutionally impermissible.

Moreover, the court is not persuaded that the statutes (and jury instructions) may reasonably be understood to criminalize mere negligent submission of false claims. The statute and jury instructions state that the defendant must have acted knowing the claim to be false. It is true that the statute (and jury instructions) stated that "knowing" includes situations both where the person *"is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct."* M.C.L. § 400.602(f); (Tr. Vol. F at 1349)(emphasis added). However, simply because the statute uses the phrase "should be aware" does not mean that it can be reasonably construed to establish a mental element of mere negligence.

The statute states that to establish "knowing" the defendant must be in possession of certain facts. It is not sufficient to show that the defendant should have been in possession of, i.e., should have known, the facts. Rather, to establish "knowing," the statute requires proof that the defendant knew facts under which she *was aware* that a claim was false or *should have been aware* that a claim was false. Use of the phrase "should have been aware" does not establish a mental element of mere negligence for Medicaid and health care fraud, but establishes that ignorance of the law is not a defense. The phrase charges the defendant with knowing what constitutes a false claim. Under the statute, the defendant may be shown to have knowingly submitted false claims if it is proven that she knew facts under which she either was aware or should have been aware that a claim was false. This is neither unreasonable nor unfair, since the defendant, as an approved provider, had signed documents indicating that she was aware of the requirements for submitting valid claims and was responsible for so doing.

A further indication that the statute (and jury instructions) do not criminalize simple negligence is the additional statement that "[k]nowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." M.C.L.§ 400.602(f); (Tr. Vol. F at 1349-50).

The pertinent statutes (and jury instructions) do not establish a mental element of mere negligence for the crimes of conviction. The statutes establish a mental element of *actual knowledge of facts* (being "in possession of facts")under which a person knows or should know the nature of his or her conduct. The Michigan Court of Appeals ruled that, in the context of the charges at issue, the "'nature of his or her conduct' language in the 'knowing' definitions must refer to falseness. Accordingly, the actual or constructive knowledge element of these offenses appropriately requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit." *Velez-Ruiz,* 224 Mich. App. at 49.

To establish a mental element of negligence, the statutes would have to state that the mental element of the crimes exist where a person *knows or should have known* the facts (is or should have been in possession of facts) under which the person was aware or should have been aware of the falseness of the claim(s) submitted. They simply do not do this. Rather, the statutes require proof that the person was in possession of facts, i.e., had knowledge of the facts.[7]

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[7] The prosecution never argued that "possession of the facts" meant mere physical possession of documents or records, which if

Therefore, the court concludes that Petitioner's arguments that the conviction offenses are unconstitutional because they are either strict liability crimes or crimes for which the mental element is mere negligence, do not warrant habeas relief.

E. Issue V-Vagueness challenge

Petitioner contends that the Medicaid and health care false claims are void for vagueness. "[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1989) (internal citations and quotations omitted).

The Michigan Court of Appeals ruled that the Medicaid and health care statutes provided fair notice of the proscribed conduct in terms a person of ordinary intelligence could understand and therefore were not void for vagueness. *Velez-Ruiz*, 224 Mich. App. 50-51. The statutes criminalize the knowing presentation of false claims. "Knowing" is

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examined, would be the basis of knowledge of the facts. Evidence was presented from which a reasonable inference could be drawn that Petitioner had actual knowledge of the facts.

defined as meaning that the person is in possession of facts such that he or she was aware or should have been aware of the nature of his or her conduct, i.e., was aware or should have been aware that the claims were false. The court concludes that the Michigan Court of Appeals' ruling that the statutes give fair notice of the actions rendered criminal is a reasonable application of controlling federal law.

Evidence clearly showed that Petitioner signed documents in which she promised to follow prescribed procedures when submitting (or causing to be submitted) claims for payments to Medicaid and BCBSM and acknowledged that she was responsible for the submission of correct claims information. Expert testimony established that it was improper to submit claims for ancillary or peripheral services as claims for office visits. Evidence was submitted that Petitioner's office nevertheless submitted one thousand three hundred and fifty-seven such claims. Further evidence showed that Petitioner generally provided the diagnosis codes used and on some occasions provided procedure codes.

While Petitioner testified that she lacked understanding of the billing manuals provided, she had promised to become familiar with their contents. Further, evidence was presented that Petitioner was the ultimate authority on the running of her medical practice as a business. Petitioner never claimed to have sought information, advice, or clarification about whether ancillary or peripheral services could be properly billed under office visit codes from the insurers Or administrators involved. On the contrary, evidence was presented that Petitioner admitted to Agent James Clickner that she was aware that office visit billings or claims had been made for peripheral or ancillary services.

The court concludes that the evidence produced at trial demonstrated that Petitioner is one to whose conduct the statute clearly applies; therefore, she cannot successfully challenge the statute for vagueness. Consequently, for the above stated reasons, Petitioner's vagueness challenge to the Medicaid and health care false claims statutes is denied.

VI. Conclusion

The court concludes that Petitioner's conviction and sentence do not involve a judgment which is contrary to, or an unreasonable application of, clearly established federal constitutional law, or an unreasonable determination of the facts. Therefore, Petitioner is not entitled to habeas corpus relief. Based on the foregoing,

IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED** and the matter is DISMISSED WITH PREJUDICE.

/s/_____
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: SEP 25 2001

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

NO. 98-CV-75582-DT

[Filed September 25, 2001]

WANDA VELEZ-RUIZ, *Petitioner,*	)
v.	)
GAIL ANNE TRIMBLE, *Respondent.*	)

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Robert H. Cleland, a United States District Judge, presiding, and in accordance with the Opinion and Order entered on Sept. 25, 2001.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is, **DENIED WITH PREJUDICE**.

Dated at Detroit, Michigan, this 25th, day of September 2001.

DAVID WEAVER
CLERK OF THE COURT

BY: /s/ _____
LISA TEETS, CASE MANAGER TO
JUDGE CLELAND and DEPUTY CLERK

APPENDIX E

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC:110757
COA:172757
LC:92-064428-FH

[Entered: March 31, 1998]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

WANDA VELEZ-RUIZ,
Defendant-Appellant.

Conrad L. Mallett, Jr.,
Chief Justice

James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle
Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor,
Justices

ORDER

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be

reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 31, 1998 /s/_____

APPENDIX F

COURT OF APPEALS
STATE OF MICHIGAN

Docket # 172757

L.C. # 92-64428 FH

People of MI	)
	)
v.	)
	)
Wanda Velez Ruiz	)
	)

Peter D. O'Connell,
Presiding Judge

Donald E. Holbrook, Jr., Stephen J. Markman,
Judges

ORDER

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

August 26, 1997 /s/ _____
Date Chief Clerk

APPENDIX G

STATE OF MICHIGAN
COURT OF APPEALS

[Dated: June 3, 1997]

Nos. 171788, 172757
LC Nos. 92-064429-FH, 92-064428-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

EDGARDO PEREZ-DeLEON,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

WANDA VELEZ-RUIZ
Defendant-Appellant.

Before: O'Connell, P.J., and Holbrook, Jr. and Markman, JJ.

MARKMAN, J.

Following a jury trial, defendants were convicted of filing false Medicaid claims, MCL 400.601 *et seq.;* MSA 16.614(1) *et seq.*, and false health care claims, MCL 752.1001 *et seq.;* MSA 28.547(101) *et seq.* These convictions arose from defendants improperly billing Medicaid, Medicare and Blue Cross Blue Shield of Michigan (BCBSM) for office visits when patients were not in the office. Defendant Perez-DeLeon, husband of defendant Velez-Ruiz and office manager of her medical practice, was sentenced to five years' probation with the first year to be served in jail and ordered to pay $17,169.34 in restitution. Defendant Velez-Ruiz, a doctor, was sentenced to five years' probation, 500 hours of community service and ordered to pay $38,340.63 in fines, restitution and costs. Their cases were consolidated on appeal. We affirm.

Defendants first argue that the statutes under which they were convicted were unconstitutionally vague. This Court has explained that:

> A statute challenged on a constitutional basis is clothed in a presumption of constitutionality. Further, a court is obligated to construe a statute as constitutional unless its unconstitutionality is clearly apparent.
>
> A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether

> an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms. [*People v Hubbard ('After Remand), 217 Mich App 459, 483-484; 552 NW2d 593 (1996); citations omitted.*]

This Court has further stated that:

> It is a basic principle of due process that a legislative enactment is void for vagueness if the enactment does not provide fair notice of the conduct proscribed. To give fair notice of proscribed conduct, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. The statute cannot use terms that require persons of common intelligence to guess at the statute' s meaning and differ regarding its application. [*Sanchez v Lagoridakis,* 217 Mich App 535, 555; 552 NW2d 472 (1996); citations omitted.]

This Court reviews vagueness challenges in light of the facts at issue. *People v Holt,* 207 Mich App 113, 121; 523 NW2d 856 (1994).

The Medicaid false claim act provides:

> A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act... upon or against the state, *knowing* the claim to be false. [MCL 400.607(1); MSA 16.614(7)(1); emphasis supplied.]

MCL 400.602(d); MSA 16.614(2)(d) defines "false" as "wholly or partially untrue or deceptive." MCL 400.602(f); MSA 16.614(2)(f) defines the term "knowing":

> "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid benefit. Knowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

The health care false claim act provides:

> A person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payment of health care benefits *knowing* the claim to be false. [MCL 752.1003(1); MSA 28.547(103)(1); emphasis supplied].

MCL 752.1002(c); MSA 28.547(102)(c) defines "false" as "wholly or partially untrue or deceptive." MCL 752.1002(h); MSA 28.547(102)(h) gives essentially the same definition for "knowing" as in the Medicaid false claim act:

> "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her

> conduct is substantially certain to cause the payment of a health care benefit. "Knowing" or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

Defendants argue that the Medicaid and health care false claims acts are unconstitutional because they do not contain a *mens rea* element. Specifically, they contend that the definitions of "knowing" and "false" permit a finding of guilt on the basis of mere negligence, rather than a finding of a culpable mens rea. They argue that the knowledge element refers only to knowledge of the filing of a claim, not knowledge that the claim is fraudulent. They claim that the statutes improperly allow fraudulent intent to be presumed if a claim is determined to be false.

By their terms, these statutes proscribe presentation of a Medicaid or health care claim with knowledge that the claim is false.' MCL 400.607(1); MSA 16.614(7)(1) and MCL 752.1003(1); MSA 28.547(103)(1). "Intent and knowledge-can be inferred from one's actions and, when knowledge is an element of an offense, it includes both actual and constructive knowledge." *People v American Medical Centers,* 118 Mich App 135, 154; 423 NW2d 782 (1982). Therefore, it is not problematic that these statutes define "knowing" to include "should be aware." Contrary to defendants' contention, this actual or constructive knowledge element does not relate solely to knowledge that a claim is filed. The knowledge element relates to both "the nature of his or her conduct and that his or her conduct is substantially certain to cause the

payment of a [Medicaid or] health care benefit." In the context of the basic charges at issue presenting a claim, knowing the claim to be false contrary to MCL 400.607(1); MSA 16.614(7)(1) and MCL 752.1003(1); MSA 28.547(103)(1)-- the "nature of his or her conduct" language in the "knowing" definitions must refer to falseness. Accordingly, the actual or constructive knowledge element of these offenses appropriately requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit.

The final sentence of both acts' definition of "knowing" states that "knowing" does not include "conduct which is an error or mistake. . ." The "error or mistake" language expressly excludes innocent errors from the "knowing" definition. We believe that this exclusion was not strictly necessary, because innocent errors clearly would not otherwise be included within the scope of knowingly presenting a false claim.

The acts then exclude from this innocent errors exclusion circumstances where "the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." "Systematic" is defined as "having, showing, or involving a system, method, or plan." Random House Webster's College Dictionary (1992). "Persistent" is defined as "constantly repeated; continued." *Id.* A system, method, or plan to cause inaccuracies indicates actual knowledge of falseness, while the constant repetition of inaccuracies indicates constructive knowledge of falseness. Contrary to defendants' suggestion, the "persistent tendency" language of the exclusion from the exclusion does not criminalize innocent errors merely because they are repeated;

rather, we believe that it is intended to criminalize inaccuracies that are sufficiently persistent that the party may be charged with constructive knowledge of their falseness. Where, as here, claimants receive a steady flow of government money pursuant to claims prepared by the claimants themselves, they have an affirmative obligation to check the accuracy of their claims to avoid mistakes. Thus, th/s exclusion from the exclusion covers circumstances in which actual or constructive knowledge of falsity may be assumed because of the systematic or persistent nature of inaccuracies. As stated above, a knowledge requirement includes both actual and constructive knowledge. *American Medical Centers, supra* at 154. Where such actual or constructive knowledge exists, the conduct would not properly fit within the exclusion for innocent errors.

We conclude that the statutes provide fair notice of the proscribed conduct and do not "use terms that require persons of common intelligence to guess at the statute's meaning and differ regarding its application." *Hubbard, supra* at 483-484; *Sanchez, supra* at 555. We also note that in *People v Premen,* 210 Mich App 211, 214-216; 532 NW2d 872 (1995), this Court affirmed a conviction under MCL 752.1003(3); MSA 28.547(103)(3) despite a challenge to its constitutionality on vagueness grounds; however, the Michigan Supreme Court, 450 Mich 951; 545 NW2d 592 (1995), denied leave to appeal but ordered that this Court's opinion have no precedential effect. Specifically, we do not find the statutes unconstitutionally vague in the context of the improper billing at issue here. *See Holt, supra.* The evidence demonstrated 1357 instances of erroneous billing similar to the instances forming the basis of the present charges against defendants. This extremely high number of similar inaccuracies shows a

sufficiently persistent tendency on defendants' part to cause inaccuracies such that defendants may be charged with constructive knowledge of the falsity of billing for office visits in connection with services rendered without the patient being in the office. For these reasons, the trial court did not err in concluding that the statutes at issue are not unconstitutionally vague.[1]

Defendants next argue that the statutes are unconstitutionally vague because the various manuals that delineate the proper procedural codes to be used in billing for various health care services are vague. However, as noted above, the proper inquiry is whether the *statute* fails to give sufficient notice. Although not binding on this Court, *United States* v/,arm, 824 F2d 780 (CA 9, 198:7), is instructive. In discounting the defendant's argument that the federal Medicaid fraud statute, 42 U.S.C. 1396h(a)(1), failed to provide adequate notice of proscribed conduct because the

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[1] We do not agree, however, with the trial court's reliance on *United States v. Bay State Ambulance & Hospital Rental Service,* 874 F2d 20 (CA 1, 1989), where the court determined that the federal Medicare fraud statute, 42 U.S.C. 1395nn, was not unconstitutionally vague. In reaching this conclusion, the *Bay State* court relied in large part on the scienter requirement of the statute "knowing and willingly" coupled with an inducement element. *Id.* at 33. We do not find Bay State particularly helpful here because the instant statutes do not require that defendants "willingly" committed the offense. Rather, they require only that the false claim be submitted "knowingly" with the statutory definition of "knowing" including instances of both actual and constructive knowledge. Thus, the statutes here do not have an "unusually high scienter requirement" as relied upon by the *Bay State* Court. *Id.* at 33.

manuals that specified procedure codes-for various medical services was too vague, the Court stated at 784:

> It is the statute that must give sufficient notice of the proscribed conduct, both through adequate promulgation and definiteness in its language. *See United States v Harriss,* 347 US 612, 617; 74 S Ct 808; 98 L Ed 2d 989 (1954). Here, the statute forbids knowingly false material statements, terms that are adequate to inform the ordinary person of its bounds. Any attack on the billing codes which formed the factual backdrop that made the statements false is ultimately an attack on the sufficiency of the evidence. *See id.* at 615 (a statute is not void for vagueness despite the existence of borderline cases of applicability). If the Larms had proved that they did not know of the codes, or had proved that the codes were too vague to be understood, then there could be no knowingly false statement. But the jury found that they understood the significance of the billing codes that they used, and the record supports this finding.

Similarly, here, defendants' argument that the statutes are unconstitutionally vague because the manuals are vague does not overcome the presumption that the statutes are constitutional. Any argument that the manuals were too vague to be understood would go principally to the issue whether defendants *knowingly* made false claims. Accordingly, the trial court did not err in finding that the statutes were not unconstitutionally vague on the basis of the alleged vagueness

of the manuals.

Defendants next argue that the trial court erred in refusing to give a requested jury instruction on specific intent.

> This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. [*People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); citations omitted.]

Here, in instructing the jury, the trial court stated:

> Defendant must have acted knowing that the claim was false. "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid or healthcare benefit. "Knowing" or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.

In response to defense counsel's objection to the court's failure to give a jury instruction on specific intent, the trial court stated:

> The Court recognized that both Defendants requested the specific intent instruction. The Court considered the.., argument that an amendment to the statute and the federal case law would suggest that this is not a specific-intent crime. To the extent that it is, it is covered under the definition of "knowing" and "knowingly" as put in subsequent to the 1983 decision of the State Court of Appeals.

Defendants argue that, if we interpret the statutes as setting forth crimes without a specific intent, the statutes are unconstitutional because they are essentially designed to codify the common law crime of fraud. Defendants premise this argument on their reading of *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). They claim that *Morissette* held that courts construing statutes that codify a common law offense cannot interpret the statute as dispensing with culpable mens rea as a necessary element. In *People v Quinn*, 440 Mich 178, 185-188; 487 NW 2d 194 (1992), the Michigan Supreme Court held:

> In the seminal case of *Morissette v United States*, 342 US 246, 72 S Ct 240, 96 L Ed 288 (1952), the United States Supreme Court concluded that where the criminal statute is a codification of the common law, and where mens rea was a necessary element of the crime at common law, the Court will not interpret

> the statute as dispensing with knowledge as a necessary element. The Court stated, "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."
>
> * * *
>
> In summary, the United States Supreme Court, in interpreting legislative intent regarding the element of fault, has applied an analytical framework that considers each separate element of the statute. Statutes creating strict liability regarding all their elements are not favored. However, where a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability, *United States v. Freed,* 401 US 601, 612, 91 S Ct 1112, 1119, 28 LEd 2d 356 (1971). In such a case, the Legislature is not imposing liability without any fault at all; instead, it has determined that regarding that element, responsibility for the protection of the public should be placed on the person who can best avoid the harm sought to be prevented--the actor himself.

Thus, the *Morissette* Court did not rule, as defendants allege, that every codification of a common law offense must contain a *mens rea* element. Further, lack of specific criminal intent does not necessarily leave a statute unconstitutionally vague. *Gora v. Ferndale (On Remand),* 217 Mich App 295, 306; 551 NW2d 454 (1996).

Having already determined that the acts at issue are not unconstitutionally vague and that they require actual or constructive knowledge of the falseness of a presented claim, the only remaining question with respect to this claim of error is whether the trial court erred in failing to read the requested specific intent instruction. Defendants rely on *Premen, supra,* at 216-217, for the contention that health care fraud, as codified in the health care false claim act, is a specific intent crime. However, the Supreme Court denied leave to appeal in *Premen* and ordered that this Court's opinion "have no precedential force or effect."

This Court has vacillated on the issue whether the existence of knowledge as an element makes a crime one of specific rather than general intent. In *American Medical Centers, supra* at 153, we held that a prior version of the Medicaid false claim act was a specific intent crime because it required a mental state of "knowingly." Similarly, in *People v. Ainsworth,* 197 Mich App 321, 325; 495 NW2d 177 (1992), this Court held that the offense of stealing or retaining a financial transaction device was specific intent crime, "given that knowledge is an essential element of this crime." However, in *People v Laur,* 128 Mich App 453, 455; 340 NW2d 655 (1983) and *People v Watts,* 133 Mich App 80, 82-84; 348 NW2d 39 (1984) this Court stated that where a knowledge element is necessary to prevent innocent acts from constituting a crime, the knowledge element merely requires general criminal intent and does not make the crime one of specific intent. *See also People v. Langworthy,* 416 Mich 630, 638-641; 331 NW2d 171 (1982), which discusses the difficulty of differentiating general intent crimes from specific intent ones.

The present case does not require us to resolve whether the offenses at issue are specific intent crimes. On the authority of *American Medical Centers* and *Ainsworth,* we will assume that the knowledge element of these offenses make them specific intent crimes. The *American Medical Centers, supra* Court held, regarding a prosecution under the prior version of MCL 400.607; MSA 16.614(7), that the trial court adequately instructed the jury on the specific intent element by reading the statutory definition of the term "knowing," even though it refused to give an instruction on specific intent. *American Medical Centers,* at 153-154. Here, the trial court similarly refused to give a requested specific intent instruction and instructed the jury regarding the intent element by reading the statutory definition of "knowing."

Defendants assert that *American Medical Centers* is distinguishable because the version of MCL 400.602; MSA 16.614(2) at issue there defined "knowing" and "false statement" in different terms than the statutes at issue here. The version of the statute at issue in *American Medical Centers* did not state that "[k]nowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present" and that "knowing" includes instances where the person is in possession of facts under which he or she "should be aware" of the nature of his or her conduct. However, the trial court in *American Medical Centers* instructed the jury that knowledge included constructive knowledge. *Id.* at 154. Therefore, the fact the present version of the statute includes constructive knowledge is no basis for distinguishing the present case from *American Medical Centers.* The *American Medical Centers* Court found no error in the failure to give a

specific intent instruction where the court read the statutory definition of"knowing" and specifically noted that the instructions did not allow the jury to convict for a "simple mistake." *Id.* at 152-154. Similarly, we conclude that the jury was properly instructed regarding the knowledge element here. If the offenses at issue are specific intent crimes, reading the statutory definition of "knowing" adequately instructed the jury regarding this element despite the failure to give a specific intent instruction. See also *People v Wilson,* 159 Mich App 345, 352; 406 NW2d 294 (1987). If these offenses are not specific intent crimes, there was, of course, no duty to give a specific intent instruction.

Defendants next argue that the trial court erred in admitting evidence showing 1,357 instances of erroneous billing similar to the instances forming the basis of the charges against defendants. Specifically, defendants argue this evidence was inadmissible under MRE 404(b) because they believed that they had billed *appropriately* and did not claim that their errors were due fo clerical mistakes. Indeed, they argue that the persistence of their errors is affirmative evidence of their good-faith belief in the interpretation of the codes that they had adopted. The statutory definition of "knowing" indicates that "knowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." MCL 400.602(f); MSA 16.614(2)(f) and MCL 752.1002(h); MSA 28.547(102)(h). Under the statutory definition, this objected-to evidence goes to establishing the "knowing" element because 1,357 instances of inaccurate billing may demonstrate a "persistent tendency to cause inaccuracies to be present." Defendants' grievance here is not with the application of

MRE 404(b) but rather with the definition of "knowing" in the Medicaid and Healthcare false claim statutes. *See* discussion, *supra.* We find no merit in defendants' argument that the evidence was not relevant under the circumstances or that it was unduly prejudicial.

Defendant Velez-Ruiz next argues that the trial court erred in denying' her motion for directed verdict because there was insufficient evidence on the record at the time of the motion to support her conviction. Initially, we note that because Velez-Ruiz submitted her billings to the various insurance carriers via a computerized billing service and so notified the carriers, the statutes created a rebuttable presumption that any false claim was knowingly made. MCL 400.608(3); MSA 16.614(8)(3) and MCL 752.1007(3); MSA 28.547(107)(3). Additionally, other evidence suggested that Velez-Ruiz was aware of her office's improper billing practices. There was testimony that Velez-Ruiz told office employees not to document follow-up appointments as such because there were billing ramifications. The evidence suggests that Velez-Ruiz acceded to Perez-DeLeon's alterations of diagnostic codes that she had chosen. This suggests that she knowingly allowed Perez-DeLeon to inaccurately characterize the nature of the services that she provided. Further, the evidence of 1,357 instances of inaccurate billing also satisfies the statutory definition of "knowing." Therefore, viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *See People v. Davis,* 216 Mich App 47, 52-53; 549 NW2d 1 (1996). Because of the difficulty in proving a defendant's state of mind, circumstantial evidence is often necessary and is wholly satisfactory in sustaining a conclusion

that defendant possessed the requisite intent. *People v. Bowers,* 136 Mich App 284, 297; 356 NW2d 618 (1984).

Velez-Ruiz further argues that the trial court abused its discretion in denying her motions for severance and for a separate jury. However, both defendants claimed that they did not know the billings were inaccurate. Their defenses were not mutually exclusive or irreconcilable; therefore, severance was not required here. *See People v Cadle,* 209 Mich App 467, 469; 531 NW2d 761 (1995). In addition, defendant failed to submit an affidavit or make an offer of proof that persuasively demonstrated that her substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice. *See People* v. *Hana* 447 Mich 325, 346-347; 524 NW2d 682 (1994).

The trial court did not specifically address Velez-Ruiz's argument that separate trials or juries should be granted because otherwise she would not be able to cross-examine Perez-DeLeon regarding statements he made that may have been incriminating to her. However, none of Perez-DeLeon's alleged admissions or statements entered into evidence *directly* incriminated Velez-Ruiz in the manner envisioned in *Bruton v. United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), *Richardson v. Marsh,* 481 US 200, 207-208; 107 S Ct 1702; 95 L Ed 2d 176 (1987), and *People v. Frazier,* 446 Mich 539; 521 NW2d 291 (1994). They did so only by inference. Therefore, in light of the trial court's clear instruction to the jury that it should not consider evidence admitted against one defendant when considering the guilt of the other, Velez-Ruiz's confrontation rights were not violated. For these reasons, Velez-Ruiz was not entitled to a new trial on the basis of the court's refusal to sever her trial

from Perez-DeLeon's.

Velez-Ruiz next argues that this Court should review various notes and records, prepared by the prosecution regarding its settlement agreement with Dr. Benejam, and evaluated by the court in camera, to determine if the trial court abused its discretion by not ordering that they be disclosed to defendant. However, defendant has provided no clear explanation as to why such notes and records would be relevant to her defense. Therefore, the trial court did not abuse its discretion in refusing to order that the notes were discoverable. *See People v. Stanaway,* 446 Mich 643, 680; 521 NW2d 557 (1994).

Perez-DeLeon raises four additional issues in a separate brief filed in propria persona.[2] He raises two claims of ineffective assistance of counsel. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v. Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). His claims here do not meet this standard. He further claims that the charges at issue constitute malicious prosecution. The elements of malicious prosecution are a "special injury," that prior proceedings terminated in favor of the present plaintiff,

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[2] Appellate briefs are generally limited to fifty pages. MCR 7.212(B). Here, the brief submitted by Perez-DeLeon's counsel was fifty pages long. We question the practice of submitting an additional appellate brief, in propria persona, without moving for permission to file a brief in excess of the fifty-page limit.

the absence of probable cause for those proceedings, and a showing of malice. *Friedman v. Dozorc,* 412 Mich 1, 48; 312 NW2d 585 (1981). If Perez-DeLeon had filed a malicious prosecution action, his allegations would not satisfy this standard. Finally, he claims that the circuit court lacked subject matter jurisdiction over the charges at issue because the original purpose of the false claims acts at issue was to proscribe claims for medical services that were not medically necessary. Perez-DeLeon contends that all of the claims at issue were for medically necessary services. By their express terms, the acts at issue reach false claims regardless of whether the services were medically necessary. For these reasons, we find no merit in any of the claims raised in Perez-DeLeon's separate brief.

Affirmed as to both defendants.

/s/Stephen J. Markman
/s/Peter D. O'Connell
/s/Donald E. Holbrook, Jr.

APPENDIX H

THE MICHIGAN MEDICAID FALSE CLAIM ACT (EXCERPT)

Act 72 of 1977

400.601 Short title. [M.S.A. 16.614(1)]

Sec. 1. This act shall be known and may be cited as "the medicaid false claim act".
History: 1977, Act 72, Imd. Eft. July 27, 1977.

400.602 Definitions. [M.S.A. 16.614(2)]

Sec. 2. As used in this act:

(c) "Deceptive" means making a claim or causing a claim to be made under the social welfare act, Act No. 280 of the Public Acts of 1939, which contains a statement of fact or which fails to reveal a material fact, which statement or failure leads the department to believe the represented or suggested state of affair to be other than it actually is.

(d) "False" means wholly or partially untrue or deceptive.....

(f) "Knowing" and "knowingly" means that a person is in possession of facts under which he

or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit. Knowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.....

History: 1977, Act 72, Imd. Eft. July 27, 1977 ;--Am. 1984, Act 333, Imd. Eft. Dec. 26, 1984.

400.607 Making or presenting false claims; violations as separate offenses; liability of health facility or agency; violation as felony; penalty. [M.S.A. 16.614 (7)]

Sec. 7. (1) A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, Act No. 280 of the Public Acts of 1939, as amended, being sections 400.1 to 400.121 of the Michigan Compiled Laws, upon or against the state, knowing the claim to be false.....

(3) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $50,000.00, or both.

History: 1977, Act 72, Imd. Eff. July 27, 1977;--Am. 1984, Act 333, Imd. Eff. Dec. 26, 1984.

400.608 Prosecution; evidence; rebuttable presumptions. [M.S.A. 16.614(8)]...

(3) If a claim for a medicaid benefit is made by means of computer billing tapes or other electronic means, it shall be a rebuttable presumption that the person knowingly made the claim if the person has notified the department of social services in writing that the claims for medicaid benefits will be submitted by use of computer billing tapes or other electronic means. . .

History: 1977, Act 72, Imd. Eff. July 27, 1977; Am. 1984, Act 333, Imd. Eff. Dec. 26, 1984.

THE MICHIGAN HEALTH CARE FALSE CLAIM ACT
(EXCERPT)

Act 323 of 1984

752.1001 Short title. [M.S.A. 28.547(101)]

Sec. 1. This act shall be known and may be cited as "the health care false claim act".

History: 1984, Act 323, Eft. Mar. 29, 1985.

752.1002 Definitions. [M.S.A. 28.547(102)]

Sec. 2. As used in this act:.....

(b) "Deceptive" means making a claim to a health care corporation or health care insurer which contains a statement of fact or which fails to reveal a material fact, which statement or failure leads the health care corporation or health care insurer to believe the represented or suggested state of affair to be other than it actually is.

(c) "False" means wholly or partially untrue or deceptive.

(h) "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a health care benefit. "Knowing"

or "knowingly" does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.....

History: 1984, Act 323, Eft. Mar. 29, 1985

752.1003 False claims, statements, or representations; violation as separate offense; liability of health facility or agency; concealing or failing to disclose certain events; violation of section as felony; penalty; section inapplicable to application for coverage. [M.S.A. 28.547(103)]

Sec. 3. (1) A person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payment of health care benefits knowing the claim to be false....

(5) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 4 years, or by a fine of not more than $50,000.00, or both.....

History: 1984, Act 323, Eff. Mar. 29, 1985 .

752.1007 Evidence; rebuttable presumptions. [M.S.A. 28.547(107)]...

(3) If a claim for a health care benefit is made by means of computer billing tapes or other

electronic means, it shall be a rebuttable presumption that the person knowingly made the claim if the person has advised the health care corporation or health care insurer in writing that the claims for health care benefits will be submitted by use of computer billing tapes or other electronic means. . .

History: 1984, Act 323, Eff. Mar. 29, 1985

APPENDIX I

STATE OF MICHIGAN
55TH JUDICIAL DISTRICT
30TH JUDICIAL CIRCUIT

INFORMATION FELONY
Amended

CASE NO. 92-1213-FY
DISTRICT 92064428-FH

District Court ORI: MI-
Courthouse, Mason, MI 48854

Circuit Court ORI: MI-
(517) 483-6500
Hon. Peter D. Houk

THE PEOPLE OF THE STATE OF MICHIGAN v.

Defendant's name and address

WANDA VELEZ-RUIZ, M.D.
1319 Charrington
Birmingham, MI 48010

Victim or complainant
State of Michigan

Complaining witness
James P. Clickner

Information Felony, Amended

Co-defendant(s)
Roberto Benejam, M.D. and Eduardo Perez

Date: On or about
Jan. 1990 - May 1991

City/Twp./Village
Detroit

County in Michigan
Wayne

Defendant CTN
97-92-000007-03

Defendant DOB
6/14/53

Police agency report no.
91-02-0107

Charge
Ct. 1 Conspiracy to Commit Medicaid Fraud (PACC 400.606); Cts 7-14 Medicaid False Claims (PACC 400.6071); Ct 20 Conspiracy to Commit Health Care Fraud (PACC P623-172-487-396 752.1005); Cts 21-24 and 28-32 Health Care False Claims (PACC 752.10031)

Maximum Penalty
Ct 1, 10 yrs/$50,000 fine; Cts 7-14, 4 yrs/ $50,000 fine; Ct 20, 10 yrs/ $50,000; Ct 21-32, 4yrs/ $50,000

Information Felony, Amended

Defendant D.L.
V426-866-161-445

WITNESS LIST PREVIOUSLY FILED

STATE OF MICHIGAN, COUNTY OF WAYNE
MICHIGAN ATTORNEY GENERAL

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

SEE ATTACHED COUNTS 1, 7-14, 20-24 and 28-32

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney
By /s/ _____

January 21, 1993
Date

Information Felony, Amended

AMENDED INFORMATION - VELEZ-RUIZ

COUNT 1

CONSPIRACY TO COMMIT MEDICAID FRAUD

Between January 1990 and May 1991, Defendants Velez-Ruiz, Benejam and Perez-DeLeon, with intent to combine and conspire to file false Medicaid claims, and for the purpose of obtaining payment from the Michigan Department of Social Services (MDSS) for services they did not provide, made false claims or caused false claims to be made with the Medicaid program. Defendants did so by making claims for medical services which were not in fact provided or by making claims for medical services for which payment had already been made. Thus, Defendants' conduct resulted in a conspiracy to commit Medicaid fraud in violation of MCL 400.606.

PENALTY: 10 years and/or $50,000

COUNTS 7-10

On September 25, 1990, Defendants Perez-DeLeon and Velez-Ruiz made or caused to be made claims for payment under Defendant Velez-Ruiz' provider identification number for medical services to Jessica Ruiz (patient ID No. 20685732) on August 2 or 6, 1990, knowing that Defendant Velez-Ruiz provided no such services. Defendants Perez-DeLeon and Velez-Ruiz claimed payment for the services listed below.. MDSS then paid these claims. Thereafter, Defendants re-billed the MDSS for these same procedures on the same dates and for the same patient, using the provider ID

number of Defendant Benejam who had actually provided the services.

In this way, Defendants knowingly made or caused to be made false Medicaid claims in violation of MCL 400.607(1).

COUNT	PROCEDURE CODE	DESCRIPTION OF SERVICE	DATE OF SERVICE
7	81000	Service Urinalysis	8/2/90
8	90060	Intermediate Service	8/2/90
9	81000	Urinalysis	8/6/90
10	90060	Intermediate Service	8/6/90

PENALTY: 4 years and/or $50,000 on each count.

COUNTS 11-14

MEDICAID FALSE CLAIMS

On each of the dates indicated in Column A below, and in each case for Medicaid patient Krystal Hammond (patient ID No. 11253649), Defendants Perez-DeLeon and Velez-Ruiz made or caused to be made claims for the medical services listed in Column B below knowing in fact that those services were not provided on the dates indicated in those

claims (Column C). These claims were submitted to MDSS under the provider number of Defendant Velez-Ruiz. The only services provided to Krystal Hammond on these dates are indicated in Column D. Medical providers are entitled to no reimbursement for providing these services.

In this way, Defendants Perez-DeLeon and Velez-Ruiz knowingly made or caused to be made false Medicaid claims in violation of MCL 400.607(1).

	A	B	C	D
	DATE OF CLAIM	MEDICAL SERVICE CLAIMED	CLAIMED DATE SERVICE PROVIDED	ACTUAL SERVICE RENDERED
11	10/16/90	Limited Service 90050	9/14/90	Referral Appointment Scheduled
12	10/16/90	Limited Service 90050	9/20/90	Referral Appointment Scheduled
13	11/20/90	Intermediate Service 90060	10/24/90	Telephoned Prescription
14	12/4/90	Limited Service 90050	11/8/90	Referral Appointment Scheduled

PENALTY: 4 years and/or $50,000 on each count.

Information Felony, Amended

COUNT 20

CONSPIRACY TO COMMIT HEALTH CARE FRAUD

Between January 1990 and May 1991, Defendants Velez-Ruiz, Benejam and Perez-DeLeon, with intent to combine and conspire to file false claims for health care benefits and for the purpose of obtaining payment from BC/BS and Medicare-Part B for services which were not provided, made false claims or caused false claims to be made. Defendants did so by making claims for payment of medical services which were not in fact provided. Thus, Defendants' conduct amounts to a conspiracy to commit health care fraud in violation of MCL 752.1003(1).

PENALTY: 10 years and/or $50,000

COUNTS 21-24

HEALTH CARE FALSE CLAIMS

On each of the dates indicated in Column A below, and for each of the subscribers indicated in Column B below, Defendants Velez-Ruiz and Perez-DeLeon made or caused to be made false claims for health care benefits to BC/BS of Michigan, under a health insurance contract, knowing the claims to be false to wit: these Defendants knowingly made or caused to be made claims for the payment of the medical services listed in Column C below, knowing in fact that those services were not provided on the dates indicated (Column D) in violation of MCL 752.1003(1). The only services provided on those dates are indicated in Column E. Medical providers

are entitled to no reimbursement for providing these services.

A	B	C	D	E
DATE OF CLAIM	SUB-SCRIBER	SERVICE AND PROCEDURE CODE CLAIMED	DATE OF SERVICE CLAIMED	ACTUAL SERVICE RENDERED
21 8/9/90	Carmen Bonilla	Limited Service 90050	7/16/90	Referral Appointment Scheduled
22 8/9/90	Carmen Bonilla	Limited Service 90050	7/17/90	Referral Appointment Scheduled
23 8/30/90	Carmen Bonilla	Limited Service 90050	8/13/90	Referral Appointment Scheduled
24 9/20/90	Carmen	Intermediate Service 90060	9/4/90	Request For Form

PENALTY:- 4 years and/or $50,000 on each count.

COUNTS 28-32

HEALTH CARE FALSE CLAIMS

On each of the dates indicated in Column A below, and for Genara Davila, an eligible Medicare-Part B patient, Defendants Perez-DeLeon and Velez-Ruiz made or caused to be made false claims for the payment of health care benefits

by BC/BS under the Medicare-Part B program knowing the claims to be false; to wit: Defendants knowingly made or caused to be made claims for the payment of the medical services listed in Column B below, knowing in fact that those services were not provided on the dates indicated in those claims (Column C) in violation of MCL 752.1003(1). The only service provided on those dates are indicated in Column D. Medical providers are entitled to no reimbursement for providing these services.

A	B	C	D	E
		SERVICE AND		
DATE	MEDI-	PROCEDURE	DATE OF	ACTUAL
OF	CARE	CODE	SERVICE	SERVICE
CLAIM	PATIENT	CLAIMED	CLAIMED	RENDERED
28 5/13/91	Genara Davila	Limited Service 90050	2/16/90	Referral Appointment Scheduled
29 4/26/90	Genara Davila	Extended Service 90070	3/24/90	Received Home Health Care Form
30 4/26/90	Genara Davila	Extended Service 90070	3/31/90	Received Home Health Care Form
31 5/3/90	Genara Davila	Extended Service 90070	4/16/90	Telephoned Prescription
32 7/25/90	Genera	Intermediate	6/18/90	Telephoned

Information Felony, Amended

Service Prescription
90060

PENALTY: 4 Years and/or $50,000 each Count
CASES/91-O2-0107/LGL INFO 14 INFO17

APPENDIX J

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

Nos. 92-64428-FH, 92-64382-FH, 92-64429-FH
[Filed August 31, 1993]

PEOPLE OF THE STATE OF MICHIGAN,	)
Plaintiff,	)
WANDA E. VELEZ-RUIZ, M.D., ROBERTO BENEJAM, M.D., and EDGARDO PEREZ-DELEON, M.D.,	)
Defendants.	)

Hon. Peter D. Houk

OPINION AND ORDER
(Excerpt)

INTRODUCTION

This matter is before the Court on five motions brought by the Defendants. First, Defendants urge the court to dismiss the information because the statute under which

they are being prosecuted is unconstitutionally vague. They also assert that it is void for lack of due process because it doesn't require any "culpable mental element". Defendants' second motion asks the court to quash the information for lack of sufficient evidence adduced at the preliminary examination to establish probable cause. Defendants' third motion seeks to prevent the prosecution from introducing similar acts testimony pursuant to MRE 404(b). Similarly, the fourth motion seeks to prohibit the use of a statement made by Dr. Velez-Ruiz to her husband in the presence of a Medicaid fraud investigator. Finally, Defendants' request the court to sever their trials.

Facts will be set forth as pertinent to the various portions of this opinion.

MCL 400.601., et seq and MCL 752.1001 ARE CONSTITUTIONAL

Defendants' claims that the statutes are unconstitutionally vague and a violation of due process because they create a strict liability offense are without merit. The court finds the reasoning of the United States Court of Appeals in *United States of America v. Bay State Ambulance and Hospital Rental Service. Inc.*, 874 Fed 2d 20 (1st Cir. 1989) persuasive and dispositive of these analogous claims...

ORDER

Defendant's motions for: separate trials, to quash, in limine to prevent the use of similar acts and admission or statements, and to rule the statute unconstitutional are **DENIED.**

Circuit Court Opinion and Order - (Excerpt)

Dated: 8/31/93

/s/_____
PETER D. HOUK
Circuit Judge

APPENDIX K

Court of Appeals
State of Michigan

Docket # 152049
L.C. # 91-03744

PEOPLE OF MICHIGAN)
)
v.)
)
VICTOR PREMAN)
)

ORDER

The court orders that the motion for leave to file brief amicus is **GRANTED.**

The motion for rehearing is **DENIED**. The Court is of the opinion that 1984 PA 333, Sec. 1 did not alter those portions of the definition of "knowledge" which provided the analytical framework for the holding in *People v. American Medical Centers of Michigan, Ltd*, 118 Mich. App. 135 (1982), that the crime in question is one containing an element of specific intent. Medicaid or health care billing fraud is not one of the situations in which knowledge and intent are distinguishable. Cf. *Posters 'N' Things v. United States*, 511 US 513; 114 S.Ct. 1747; 128 L Ed 2d 539, 550-551 (1994).

Circuit Court Order

Dated: July 21, 1995

/s/_____
Chief Clerk